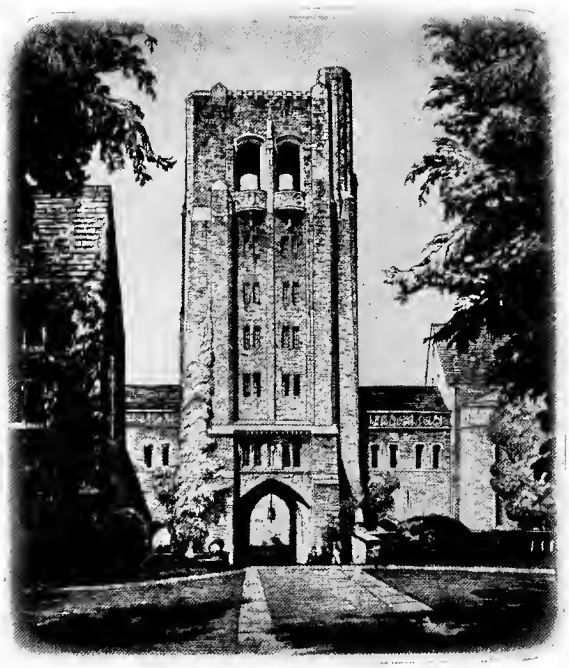

CASES

ON

RAILROAD LAW

COMPILED BY
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PREFACE.

This compilation of cases has been made for use, in connection with a text-book, in instructing a class of law students in Railroad Law. That which the author has generally employed for this purpose is Pierce on Railroads, and especial prominence has been given to cases upon topics which are there omitted.

New Haven, Conn., June 1, 1896.

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ILLUSTRATIVE CASES

ON

RAILROAD LAW.

Defective organization papers. Corporation de facto. Acts of user.

BUFFALO & ALLEGANY R. R. CO. v. CARY.

(26 N. Y. 75.)

Court of Appeals of New York. Dec., 1862.

Appeal from the superior court of Buffalo.

Action upon the subscription of the intestate to the capital stock of the plaintiff. The plaintiff undertook to become incorporated under the general railroad act of 1850. In May, 1853, its articles of association were filed, and the intestate, June 8th, thereafter, became a subscriber for one thousand dollars of the capital stock, and paid ten per cent at the time of subscription, and died in September, 1853. The directors, after his death, made seven calls upon the stock of one hundred dollars each, and for this seven hundred dollars, claimed to be due, this action was brought. The affidavit indorsed upon and filed with the articles of association was conceded to be defective; it containing no statement of an intention in good faith to construct or operate the road mentioned in the articles. In 1858 a law was passed by the legislature of this state authorizing the plaintiff to sell its property and effects to another railroad company; and, by the second section of the act, the plaintiff was declared to be a valid corporation, duly organized under the act to authorize the formation of railroad corporations and to regulate the same, passed April 2, 1850, and the several acts amending the same, notwithstanding any error, informality, insufficiency, act or omission, on the part of such company or any of its stockholders in the proceedings to become incorporated, and the said corporation and all the proceedings of its stockholders and officers were thereby legalized and confirmed. By another section, it was provided that nothing contained in this act should affect any suit before then commenced in any court. Upon the trial, the plaintiff offered in evidence certified copies of the articles of association filed with the county clerk and comptroller, and they were objected to, on the ground of the defect in the affidavit. The plaintiff then read in evidence the act of 1858, and thereupon the court overruled the objection, and the articles of association were read in evidence, and the defendant excepted. The plaintiff then gave evidence of the election of directors and officers, June 1, 1853, and the purchase of the route of the proposed road after such election, and that contracts were made for its construction, and that the contractors entered upon the work, and that money was paid on various subscriptions to the capital stock, and expended on the road, and liabilities incurred in the construction. Evidence was given of the various calls for payment upon the stock, counted upon in the complaint. At the close of the evidence the defendant moved for a nonsuit, on the ground that the plaintiff had failed to prove its corporate existence at any time prior to the passage of the act of 1858, if at all; and that the defendant was not liable on the subscription of the intestate. The motion was denied, and the defendant excepted. Judgment was given for the plaintiff for the full amount claimed, which was affirmed at general term, and the defendant appealed to this court.

MASTEN, J. The defendant contends that the plaintiff's organization is defective, because the affidavit annexed to the articles of association does not contain the allegation required by the statute, "that it is intended in good faith to construct or to maintain and operate the road mentioned in the articles of association," and that it is not therefore a corporation. The articles of association are in due form, and the affidavit annexed to them, while it does not come up to the requirement of the statute in the particular specified, is colorable. The articles and affidavit were filed and recorded in the office of the secretary of state; the capital stock was subscribed and partly paid in; the route of the road was surveyed and located; the right of way obtained; a contract for the construction of the whole road entered into, and liabilities incurred which have not been satisfied. This was sufficient to constitute the plaintiff a corporation de facto, so that neither it nor its stockholders can object that it is not strictly a corporation de jure.

I am of the opinion that, under this and similar general acts for the formation of corporations, if the papers filed, by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the state against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation de facto, and no advantage can be taken of such defect in its constitution, collaterally, by any person.

Any other rule, it seems to me, must be fraught with serious consequences and great public mischief. Most of the persons who subscribe in good faith for the stock do not examine to see whether all the requirements of the statute in the organization of the corporation have been complied with; and if they did examine would not probably discover a defect like the one now pointed out. The stock is sold in market from hand to hand without any such examination. The corporation may carry on its business for years, and its stock have entirely changed hands, when its property may be destroyed by a trespasser, and in an action against him in the name of the corporation, his only defence, "you are not legally a corporation by reason of a defect in your constitution," would (upon the doctrine contended for by the defendant) be successful. The doctrine of estoppel could not be applied in that case, as it has been in some cases, to counteract an erroneous decision upon the question now before me.

I am aware that there are decisions in the Supreme Court, beginning with Society v. Rapalee, 16 Wend. 605, upon the point now

presented to us, in conflict with the opinion I have here expressed. Their error is, in not recognizing the distinction between what is sufficient to constitute a corporation de facto and what is necessary to constitute one de jure, and how and by whom a corporation de facto may be shown not to be a corporation de jure. The state alone can take advantage of a defect in the constitution of a corporation like the one in this case. In its action it will be governed by public policy and considerations. And it has declared that it will not take advantage of the defect in the plaintiff's constitution. I think the court of appeals has settled the principle as I have stated it. Eaton v. Aspinwall, 19 N. Y. 119.

Judgment affirmed.

DENIO, C. J., and DAVIES, WRIGHT, GOULD, and SMITH, JJ. concur.

ALLEN, J. (dissenting). The plaintiff's right to recover must, I think, depend upon the validity and sufficiency of the proceedings for their incorporation under the general act of 1850. The question is upon the validity of the contract alleged to have been made by the intestate by his subscription on the 8th of June, 1853; and the tests of its validity must be applied as of that date. There is no evidence that he did anything, after that time, recognizing the existence of the corporation, and up to that time there had been no user of the franchise which would estop any one from disputing the corporate existence of the plaintiff. All that had been done under the articles of association was, that the persons named as directors had come together and chosen from their number a president, secretary, treasurer, and other officers. This was in no sense a user of any corporate franchise extended to the body as a corporation by the laws of the state. By thus getting together, calling themselves a corporation and electing officers, they did not become a corporation quoad third persons and the people, so that their corporate existence could only be questioned by the attorney-general upon a quo warranto. Had they, on the 2d day of June, 1853, brought an action as a corporation, no one would claim that this formal election of officers was such a user of a corporate franchise as to constitute them a corporation de facto. And yet that was all there was when the plaintiff subscribed; and if they were not then a corporation, either de jure or de facto, the contract was invalid, and the subsequent acquisition by the plaintiff of certain corporate rights, as against third persons and the public, by usurpation, could not inure by relation to establish a contract against an individual having no subsequent concern or dealing with the company. A single act in the exercise of the franchise claimed would not be a user, within the rule that makes a user evidence of corporate existence; still less is the preparation to enter upon the user sufficient to establish the existence of a corporation. The user of a corporate franchise has never, so far as cases have come to my notice, been relied upon or regarded as evidence of corporate existence in actions upon subscriptions to the capital stock. Indeed it could not be, for the reason that contracts of that character are incident to the creation of the corporation. In some cases a person dealing with a corporation is estopped from denying its existence. Aug. & A. Corp. § 94. But in this court, as well as in other courts, in actions upon subscriptions to the capital stock, the question of the creation and existence of the corporation has been regarded as an open question, and the subscriber has not been concluded by his subscription. The questions made in the cases that have been before this court would have been very easily disposed of, had the doctrine of estoppel been deemed applicable; and the fact that the proceedings for the incorporation have been examined and cases disposed of upon the merits, is very high evidence that the subscriber is at liberty to controvert the existence of the corporation. Plankroad Co. v. Vaughan, 14 N. Y. 546; Railroad Co. v. Hatch, 20 N. Y. 157. There is good reason why the party should not be held to have admitted the existence of the corporation by his subscription. The consideration of his undertaking is the shares of stock which he receives, or expects to receive, from the corporation. If the company has not been legally incorporated, the stock, as such, is of no value; it has no existence. He agrees to pay for what he cannot get, and hence his promise is nudum pactum. It was decided, in Society v. Rapalee, supra, that a promise in writing to pay a certain sum to the trustees of a certain church did not estop the promisor from requiring proof, or, in other words, from denying the incorporation of the church: Canal Co. v. Hathaway, 8 Wend. 480; Corporation v. Valentine, 10 Pick. 142; Proprietors v. Theobold, 1 Moody & M. 151; Plankroad v. Thatcher, 11 N. Y. 102; Plankroad Co. v. Wetsel, 21 Barb. 56; Plankroad Co. v. Rice, 7 Barb. 157; all of which, with the exception of the first, were actions upon stock subscriptions, and in all of which the question of the proper organization and incorporation of the plaintiff was made by the defendants and considered by the court. Valk v. Crandall, 1 Sandf. Ch. 179, was the case of a subscription intermediate an irregular organization of a banking association, by a certificate not in conformity with the statute, and a formal perfect organization by filing a certificate as required by law; and it was held that the subscription and the mortgage given as security were void. It does not need the citation of authority to the proposition that a party, seeking to avail himself of a special privilege or franchise under a statute, must bring himself strictly within the terms of the act the benefit of which he seeks. The principle is elementary. The statute authorizing

the creation of corporations, by the voluntary association of individuals for that purpose, must be strictly pursued. A compliance with the statute is a condition precedent to the existence of the corporation. No act required by the statute as a preliminary to the formation of the corporation can be omitted as nonessential. In Plankroad Co. v. Vaughan, supra, stress was laid upon the fact that the documents mentioned and called for by the statute contained all that was, in terms, required to be inserted in them; thus conceding that any departure from the statute, in omitting to comply with a positive requirement, would have been fatal. In Railroad Co. v. Hatch, supra, judgment was given for the plaintiff, for the reason that there was a substantial compliance with the statute in all respects; and the same remark applies to the case of Plankroad Co. v. Thatcher. It is only on compliance with the provisions of this act that the articles of association may be filed in the office of the secretary of state, and the associates become a corporation. Laws 1850, p. 211, § 1. Section 2 of this act forbids the filing and recording of the articles of association and the incorporation of the associates, until there is indorsed upon or annexed to such articles an affidavit, made by at least three of the directors named in the articles, stating, among other things, that "it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association." This is omitted in the affidavit filed with the plaintiff's articles of association. The statute required some evidence of the good faith of the associates, and prescribed this as the evidence to be presented. When the legislature parted with their discretion and supervisory control in the matter of creating railroad corporations, it was fit and proper that the public should, so far as was practicable, be protected against fraudulent or speculative organizations under the general act: and hence the requirement of not only the subscription and payment of a given sum per mile of the proposed road, but an affidavit of the bona fide intent to carry into effect the object of the proposed corporation. The omission of this part of the required affidavit was fatal to the proceedings for the incorporation of the plaintiff. It was so regarded by the plaintiff and by the legislature, and hence the act of 1858 was passed. That act legalized the acts of the corporation from the first, and to some extent and for some purposes gave them the same rights as against third persons and the public which they would have had if the proceedings for their incorporation in the first instance had been perfect and regular. But the act could not have a retroactive effect so as to give vitality to an executory contract with a stranger void in its inception, for the reason that there was no corporation capable of contracting. If the intestate was not bound by his promise when made, no subsequent act of the legislature could create a liability. The legislature can neither make nor unmake contracts for parties. The constitution, as well as the well-defined limits of legislative power, aside from the express prohibition of the constitution, forbid this.

The judgment should be reversed and a new trial granted, costs to abide event.

SUTHERLAND, J., concurs. SELDEN, J., expressed no opinion.

Approved in Cayuga Lake R. R. Co. v. Kyle, 64 N. Y. 185.

Inter-state railroad. Foreign corporation. Jurisdiction. Effect of demurrer in relating back. Waiver of prior pleading. Coupon tickets.

RAILROAD CO. v. HARRIS.

(12 Wall. 65.)

Supreme Court of the United States. Dec., 1870.

Action by a passenger against a railroad company to recover damages for a personal injury. There was a judgment for plaintiff. Defendant brings error. Affirmed.

The facts sufficiently appear in the opinion of the court.

Mr. Justice SWAYNE. This is a writ of error to the supreme court of the District of Columbia.

Harris sued the Baltimore and Ohio Railroad Company for injuries which he received by a collision. The declaration sets out that the company is a corporation established by law by the name of the Baltimore and Ohio Railroad Company, having a legal and recognized existence within the limits of the District of Columbia, and exercising there their corporate rights and privileges in the making of contracts and receiving freight and passengers for transportation upon their roads from the city of Washington to the Ohio river; that at the city of Washington, on the 23d of October, 1864, the plaintiff, wishing to be transported by the company over their roads to the Ohio river and towards the city of Columbus in the state of Ohio, for the sum of fifteen dollars, paid to the company, purchased of them a ticket for a seat and passage in their cars, to be transported along their roads from the city of Washington to the Ohio river and towards the city of Columbus; that in pursuance of this contract he took his seat in one of the cars of the company; that the company, in consideration of the money so paid, undertook and promised to transport him safely to the Ohio river; that the company managed their trains so negligently and carelessly that two trains running in opposite directions, came in collision near Mannington, in the state of Virginia, whereby the plaintiff received the injuries complained of.

The company pleaded two pleas in abatement. (1) That the company was not an inhabitant of the District of Columbia when the writ was served. (2) That the company was not found in the District of Columbia when the writ was served.

To the first plea Harris replied, that the company was an inhabitant of the District of Columbia by virtue of certain acts of congress, the dates and titles of which are set forth, and that they had accepted the provisions of those acts and constructed their roads under them, availing themselves of the privileges thus conferred, and doing business under them in the District of Columbia. To the second plea he replied that the company was found within the District of Columbia when the writ was served, and was within the jurisdiction of the court by virtue of the acts of congress mentioned in the first replication.

The company demurred to these replications. The demurrers were overruled. The company thereupon filed the general issue of not guilty. The cause was tried by a jury and a verdict found for the plaintiff, upon which judgment was entered.

Upon the trial the counsel for the company prayed the court to instruct the jury that upon the evidence before them the plaintiff was not entitled to recover. The court refused to give this instruction, and the company excepted. Other exceptions appear by the record to have been taken, but they were not embodied in a bill of exceptions, and we cannot therefore consider them. The errors insisted upon here, at the first argument of the case, were:—

The overruling of the demurrers to the replications to the pleas in abatement.

The refusal of the court to give the instruction above set forth.

And that the declaration is fatally defective, wherefore the judgment should have been arrested, and must now be reversed.

When the case was first considered by this court in conference, it was found that while all the judges were of opinion that the judgment should be affirmed, there was a difference of opinion upon the question whether the acts of congress and the statutes of Virginia relating to the company created a new and distinct corporation in the District of Columbia and in the state of Virginia respectively, or whether they were only enabling acts in respect to the corporation under the name of the "Baltimore and Ohio Railroad Company," as originally created by the state of Maryland. Subsequently the question was ordered to stand for reargument, and it has been reargued by the counsel on both sides. As the solution of this question must determine to a large extent the grounds upon which the judgment of the court is to be placed, it is necessary carefully to consider the subject.

The Baltimore and Ohio Railroad Company was incorporated by an act of the legislature of Maryland, passed on the 28th of February, 1827. On the 8th of March following, the legislature of Virginia passed an act whereby, after reciting the Maryland act, it was declared "that the same rights and privileges shall be, and are hereby, granted to the aforesaid company within the territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations as are imposed by said act; and the same rights, privileges, and immunities which are reserved to the state of Maryland or to the citizens thereof are hereby reserved to the state of Virginia and her citizens."

Several other statutes relating to the com-

pany were subsequently passed in Virginia, but they do not materially affect the question under consideration, and need not be more particularly adverted to. By an act of the legislature of Maryland, of the 22d of February, 1831, the company was authorized to build a lateral road to the line of the District of Columbia. On the 2d of March, 1831, congress passed an act which, after reciting, by a preamble, the original act of incorporation, enacted, "that the Baltimore and Ohio Railroad Company, incorporated by the said act of the general assembly of the state of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia a lateral railroad. . . . And the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights and privileges, and shall be subject to the same restrictions, in the construction and extension of the said lateral road into and within the said District, as they may exercise or be subject to under or by virtue of the said act of incorporation in the extension and construction of any railroad within the state of Maryland, and shall be entitled to the same rights, benefits, and immunities in the use of said road and in regard thereto as are provided in the said charter, except the right to construct any lateral road or roads in said District from said lateral road." A number of local regulations follow, which are not material to be considered. A supplementary act of the legislature of Maryland, passed March 14, 1832, provided that the stock issued by the company to complete this lateral road "shall, united, form the capital upon which the net profits derived from the use of said road shall be apportioned," etc.

The act of congress of February 26, 1834, and of March 3, 1835, are confined to matters of detail, and may be laid out of view.

When the case was reargued as directed by this court, the counsel for the company admitted that the acts of congress in question were only enabling acts, and that they did not create a new corporation, but they insisted that the acts of Virginia were of a different character, and that they worked that result.

As regards the point under consideration we find no substantial difference. In both, the original Maryland act of incorporation is referred to, but neither expressly nor by implication create a new corporation. The company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, they were the same as to powers, privileges, obligations, restrictions, and liabilities as those contained in the original charter. The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends, and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged.

In what it does in Virginia the same principle is involved as in the transactions of the Georgia corporation in Alabama which came under the consideration of this court in Bank v. Earle, 13 Pet. 558. The distinction is that here the assent of the foreign authority is express, while there it was implied. A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not ultra vires which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly. Insurance Co. v. French, 18 How. 405. For the purposes of federal jurisdiction it is regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive. Railroad Co. v. Letson, 2 How. 497; Marshall v. Railroad Co., 16 How. 329; Railroad Co. v. Wheeler, 1 Black, 297.

We see no reason why several states cannot, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a single one. The Philadelphia, Wilmington, and Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland (10 How. 392), Chief Justice Taney, in delivering the opinion of this court, said: "The plaintiff in error is a corporation composed of several railroad companies, which had been previously chartered by the states of Maryland, Delaware, and Pennsylvania, and which, by corresponding laws of the respective states, were united together and form one corporation, under the name and style of the Philadelphia, Wilmington, and Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore." He gives the history of the legislation by which this result was produced. No question was raised on the subject, but the opinion assumes the valid existence of the corporation thus created. The case was brought into

this court under the 25th section of the judiciary act of 1789. The jurisdictional effect of the existence of such a corporation, as regards the federal courts, is the same as that of a co-partnership of individual citizens residing in different states. Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, quoad hoc any property within its territorial jurisdiction. That this may be done was distinctly held in Railroad Co. v. Wheeler, 1 Black, 297. It is well settled that corporations of one state may exercise their faculties in another, so far, and on such terms, and to such extent as may be permitted by the latter. Blackstone Manuf'g Co. v. Inhabitants, 13 Gray, 489; Bank v. Earle, 13 Pet. 588. We hold that the case before us is within this latter category. The question is always one of legislative intent, and not of legislative power or legal possibility. So far as there is anything in the language of the court in the case of Railroad Co. v. Wheeler, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company licensed by Ohio, suing a citizen of Indiana in the federal court of that state.

In Railroad Co. v. Gallahue's Adm'r, 12 Grat. 658, it was held by the court of appeals of Virginia that the company was suable in that state. In this we concur. We think this condition is clearly implied in the license, and that the company, by constructing its road there, assented to it. The authority of that case was recognized by the court of appeals of West Virginia, in Goshorn v. Supervisors, 1 W. Va. 308, and in Baltimore & O. R. Co. v. Supervisors, 3 W. Va. 319. Here the question is whether the company was suable in the District of Columbia. In the case reported in Grattan, it was said: "It would be a startling proposition if in all such cases citizens of Virginia and others should be denied all remedy in her courts, for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister state to seek redress." The same considerations apply to the case before us. When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that congress intended that the important powers and privileges granted should be followed by such results.

But turning our attention from this view of the subject and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought, in all respects as if it had been an independent corporation of the same locality.

We will now consider, specifically, the several objections to the judgment, relied upon by the plaintiffs in error.

The pleas in abatement were bad. The demurrers reached back to the first error in the pleadings, and judgment was properly given against the party who committed it. If the replications were bad, bad replications were sufficient answers to bad pleas. But it is said the declaration was bad, and that the demurrers brought the defect in that pleading under review. The principle has no application where the defect is one of form and not of substance. City of Aurora v. West, 7 Wall. 82.

The alleged defect in the declaration will be considered in connection with the error assigned relating to that subject. But if the court decided erroneously, the company waived the error by pleading over in bar. If it were desired to bring up the judgment upon the pleadings for examination by this court, the company should have stood by the demurrers. In the proper order of pleading, which is obligatory, a plea in bar waives all pleas, and the right to plead, in abatement. Young v. Martin, 8 Wall. 354; City of Aurora v. West, 7 Wall. 92; Clearwater v. Meredith, 1 Wall. 42; 1 Chit. Pl. 440, 441.

The bill of exceptions which brought upon the record the refusal of the court to instruct the jury that the plaintiff was not entitled to recover, exhibits, among others, the following facts: Harris contracted, paid his money, and received his tickets at the city of Washington. The tickets consisted of three coupons,—one for his passage from Baltimore to Columbus, Ohio, another for his passage from Washington Junction to Baltimore, and the third for his passage from Washington City to Washington Junction. It is necessary to consider only the two last mentioned. They are both headed "Baltimore and Ohio Railroad," and signed, "L. M. Cole, general ticket agent." Above the coupon first mentioned is this memorandum: "Responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone." Each coupon has printed on its face the words "Conditioned as above." The coupon last mentioned gave Harris the right of passage over the lateral branch both in the District of Columbia and in Maryland. The second coupon gave him the same right in respect to the main stem both in Maryland and in Virginia.

The instruction asked for assumed erroneously that there were two corporations under

the same name, one of them in Virginia, and that the latter was liable and alone liable to the plaintiff. The attempted limitation of responsibility by the memoranda at the head and on the face of the coupons proceeded upon the same erroneous assumption as to the duality of the corporate ownership of the roads.

These views are sufficiently answered by what has been already said upon the subject. But if we concurred with the counsel for the plaintiff in error we should then hold that the agent who issued the coupons was the agent of both corporations; that the contract was a joint one; and that it involved a joint liability, unless the knowledge of the memoranda on the coupons and the assent of the plaintiff were clearly brought home to him. Bissell v. Railroad Co., 22 N. Y. 258; Champion v. Bostwick, 18 Wend. 175; Cary v. Railroad Co., 29 Barb. 35; Quimby v. Vanderbilt, 17 N. Y. 306; Najac v. Railroad Co., 7 Allen, 329; Railway Co. v. Blake, 7 Hurl. & N. 987. In all such cases the burden of proof rests upon the carrier. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 388; Brown v. Railroad Co., 11 Cush. 97; Bean v. Green, 8 Fairf. 422; Dorr v. New Jersey Steam Nav. Co., 4 Sandf. 136, 11 N. Y. 485. The bill of exceptions does not show that any testimony was given upon that subject. The court was asked to assume that the limitation on the face of coupons was itself conclusive, and to instruct the jury accordingly. But having held the unity of the corporation, of the proprietorship of the roads, and of the contract, it is needless further to consider the case in this aspect.

The instruction asked for was properly refused.

The jurisdiction of the court was not governed by the 11th section of the judiciary act of 1789. It did not depend upon the citizenship of the parties. It was controlled by acts of congress local to the district. A citizen of the district cannot sue in the circuit courts of a state. Hepburn v. Ellzey, 2 Cranch, 445. If a corporation appear and defend in a foreign state it is bound by the judgment. Ang. & A. Corp. §§ 404, 405; Flanders v. Insurance Co., 3 Mason, 158, Fed. Cas. No. 4,852; Cook v. Transportation Co., 1 Denio, 98. If the declaration were insufficient, the additional averments in the replications admitted by the demurrer to be true, cured the defect. Insurance Co. v. French, 18 How. 405.

Judgment affirmed.

See, as to inter-state railroads, Railroad Co. v. Koontz (1881) 104 U. S. 5. As to jurisdiction over them of federal courts, see Nashua & Lowell R. R. Corporation v. Boston & Lowell R. R. Corporation (1890) 136 U. S. 356, 10 Sup. Ct. 1004.

Consolidation. New corporation created. Pleading. Traversing matter of law. Duplicity. Waiver of prior plea. Judgment of nil capiat.

CLEARWATER v. MEREDITH et al.

(1 Wall. 25.)

Supreme Court of the United States. Dec., 1863.

Under the provisions of a statute of Indiana, passed May 11, 1852, for the incorporation of railroads, the Cincinnati, Cambridge & Chicago Short Line Railway Company—frequently entitled throughout the case, for brevity, "The Short Line Railway"—was created and made a "corporation" in that State. Rev. St. Ind. (Ed. 1860) p. 504. This act contained no provision by which any railroad company incorporated under it could consolidate its stock with the stock of any other corporation. In February of the year following, however, the legislature did pass an act—Act Feb. 23, 1853; Rev. St. Ind. 1860, p. 526—allowing any railway that had been organized, to intersect with any other road, and to merge and consolidate their stock; an act whose privileges, on the 4th of the month following, were extended to railroad companies which should afterwards be organized. The language of the act was: "Such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected."

With these statutes in force, Clearwater, on the 12th July, 1853, sold a tract of land to Meredith and others for $10,000, taking 200 shares of the already mentioned Short Line Railway Company's stock in payment; Meredith and they, however, by written contract, guaranteeing to Clearwater, that the stock should be worth par, that is to say, $50 a share, in Cincinnati, on the 1st October, 1855.

The 1st October, 1855, having arrived and passed, and Clearwater, considering that the stock was not worth par at Cincinnati, brought assumpsit in the circuit court for the Indiana district, against Meredith and his co-guarantors, on the contract. The declaration set forth the sale, acceptance of the stock, and guaranty; that Clearwater still held possession of the stock; and it assigned for breach, that the stock was not worth par at the time and place stipulated, but on the contrary, was of no value at all.

To this declaration there were six pleas. Issues, in fact, were joined on the first and fourth, and demurrers sustained to the second, third, and sixth.

The fifth plea set forth substantially, that after the execution of the guaranty, and before the 1st of October, 1855, to wit, &c., the stock of the said Short Line Railway was merged and consolidated with the stock of a second railway company named (The Cincinnati, New Castle & Michigan Railroad Co.); making one joint stock company of the two, under a new corporate name, which was given (The Cincinnati & Chicago Railroad Co.); that the said corporations were organized and formed under the already mentioned act of May 11, 1852, to provide for the incorporation of railroad companies; that the roads were connecting and intersecting roads; that the consolidation was made with the consent of the stockholders and directors of both companies; that afterwards, in August, 1854, the said newly formed joint company was merged and consolidated with a third railway corporation of the state of Indiana, whose name was also given (The Cincinnati, Logansport & Chicago Railway Co.), which company was constructing a road that intersected with the said already mentioned newly formed joint company; that by the said consolidation, the stock of the said two companies was merged and consolidated, "forming one joint stock company out of said two companies;" that the said consolidation was made with the consent of the directors and stockholders of said two companies, and with the consent of said plaintiff; that the said consolidated company assumed a third corporate name, which was stated (The Cincinnati & Chicago Railroad Co.); and that, by reason of the said consolidation, the stock of the Short Line Railway Company in said agreement specified, was destroyed, and rendered wholly worthless and of no value. A demurrer was interposed to this plea, which was overruled.

Then the plaintiff filed a replication. To this a demurrer was put in by the other side, and the court having sustained it, an amended or rather a substituted replication was put in. To this a demurrer was also sustained. Whereupon, on motion and by leave of the court, the plaintiff withdrew his joinder in demurrer, and filed the following second amended replication: "And the plaintiff, as to the plea of the defendants fifthly above pleaded, says that he ought not, by reason of anything therein alleged, to be debarred or precluded from having and maintaining his aforesaid action against the defendants, because he says that the said stock of the Cincinnati, Cambridge & Chicago Short Line Railway Company was not destroyed, either in whole or in part, nor was the same rendered worthless and of no value, in manner and form as the defendants by their said plea have alleged. And this he prays may be inquired of by the country."

This replication was also demurred to, and the demurrer sustained. The plaintiff now saying nothing further, and choosing to abide by his last-named amended replication, judgment was rendered for the defendant.

The question presented on error here was this: Did the court below commit error when it sustained a demurrer to the last replication, and gave judgment against the plaintiff Clearwater, as it did?

Mr. Pugh, for plaintiff in error. Mr. Hendricks, contra.

Mr. Justice DAVIS, after stating the case, delivered the opinion of the court:

In order to arrive at a correct solution of this question, it is important to consider whether the plea is a good one, for a demurrer, whenever interposed, reaches back through the whole record, and "seizes hold of the first defective pleading." The plea in controversy confesses the original cause of action, but sets up matter, which has arisen subsequent to it, to avoid the obligation to perform it. It acknowledges that the guaranty was given as claimed, but insists that the consolidation of the interests and stock of the three railroad companies necessarily destroyed and rendered worthless and of no value the guaranteed stock, and that Clearwater having consented to the transfer, is in no position to claim redress from Meredith and his co-defendants.

If Clearwater was a consenting party to a proceeding which, of itself, put it out of the power of the defendants to perform their contract, he cannot recover, for "promisors will be discharged from all liability when the nonperformance of their obligation is caused by the act or the default of the other contracting party." 2 Pars. Cont. 188.

The Cincinnati, Cambridge and Chicago Short Line Railway Company, whose stock was guaranteed, was, as stated in the pleadings, organized under a general act of the state of Indiana, providing for the incorporation of railroad companies. This act was passed May 11, 1852, and contained no provision permitting railroad corporations to consolidate their stock. It can readily be seen that the interests of the public, as well as the perfection of the railway system, called for the exercise of a power by which different lines of road could be united. Accordingly, on the 23d February, 1853, the general assembly of Indiana passed an act allowing any railway company that had been organized, to intersect and unite their road with any other road constructed or in progress of construction, and to merge and consolidate their stock, and on the 4th of March, 1853, the privileges of the act were extended to railroad companies that should afterwards be organized.

The power of the legislature to confer such authority cannot be questioned, and without the authority, railroad corporations, organized separately, could not merge and consolidate their interests. But in conferring the authority, the legislature never intended to compel a dissenting stockholder to transfer his interest, because a majority of the stockholders consented to the consolidation. Even if the legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. There was no reservation of power in the act under which the Cincinnati, Cambridge & Chicago Short Line Railway was organized, which gave authority to make material changes in the purposes for which the corporation was created, and without such a reservation, in no event could a dissenting stockholder be bound.

When any person takes stock in a railroad corporation, he has entered into a contract with the company, that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and it may be, new hazards, are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line railway, and averse to risking his money in one having a longer line of transit.

But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking. Railroad Co. v. Croswell, 5 Hill, 383; Banet v. Railroad, 13 Ill. 510. The act of the legislature of Indiana allowing railroad corporations to merge and consolidate their stock, was an enabling act—was permissive, not mandatory. It simply gave the consent of the legislature to whatever could lawfully be done, and which without that consent could not be done at all. By virtue of this act, the consolidations in the plea stated were made. Clearwater, before the consolidation, was a stockholder in one corporation, created for a given purpose; after it he was a stockholder in another and different corporation, with other privileges, powers, franchises, and stockholders. The effect of the consolidation "was a dissolution of the three corporations, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders, derived from those passing out of existence;" McMahan v. Morrison, 16 Ind. 172. And the act of consolidation was not void because the state assented to it, but a non-consenting stockholder was discharged. McCray v. Railroad Co., 9 Ind. 358. Clearwater could have prevented this consolidation had he chosen to do so; instead of that he gave his assent to it and merged his own stock in the new adventure. If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined. Lauman v. Railroad, 30 Pa. St. 46. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company. By his own act he has destroyed the stock to which the guaranty attached, and made it impossible for the defendants to perform their agreement. After the act of consolidation the stock could not have any separate, distinct market value. There was, in fact,

no longer any stock of the Cincinnati, Cambridge & Chicago Short Line Railway.

Meredith and his co-defendants undertook that the stock should be at par in Cincinnati, if it maintained the same separate and independent existence that it had when they gave their guaranty. Their undertaking did not extend to another stock, created afterwards, with which they had no concern, and which might be better or worse than the one guaranteed. It is not material whether the new stock was worth more or less than the old. It is sufficient that it is another stock, and represented other interests.

But it is said that the plea is defective because it does not aver that the consolidation was an act done without the consent of the defendants. The pleadings do not aver that the defendants were stockholders in any of the roads whose interests were merged, and if they were not, it is not easy to see what right they had to interpose objections to consolidation, nor how their consent was necessary to carry out the object contemplated. If the plaintiff consented because they did, and it is meant to be argued on that account, they would still be liable on their contract; the answer is, that this is not a matter to be negatived by the defendants, but the plaintiff should reply the fact. 1 Chit. Pl. 222.

It follows that the fifth plea presented a complete defence in bar of the action.

In this plea there were two points, and two only, which the plaintiff had the right to traverse. He could deny either the act of consolidation, or that he gave his consent to it. He could not deny both, for that would make his replication double. And if either fact was untrue, the defence was destroyed. The truth of both was essential to perfect the defence. But traverse can only be taken on matter of fact, and it is always inadmissible to tender an issue on mere matter of law. 1 Chit. Pl. 645.

The last replication does traverse a conclusion of law. Whether the stock of the Cincinnati, Cambridge & Chicago Short Line Railway Company was destroyed and rendered worthless and of no value, was not a question for a jury to try. If the roads were consolidated, with the consent of the plaintiff, then it followed, as a conclusion of law, that the stock was destroyed and of no value. The stock passed out of existence the very instant the new corporation was created. The issue, therefore, tendered by the plaintiff in his last replication, was an immaterial one, and the court did not err in sustaining a demurrer to it.

But the plaintiff claims the right to have the decision of the court below on the sufficiency of his previous replications reviewed here. This he cannot do. Each replication in this cause is complete in itself; does not refer to, and is not a part of what precedes it, and is new pleading. When the plaintiff replied de novo, after a demurrer was sustained to his original replication, he waived any right he might have had, to question the correctness of the decision of the court on the demurrer. In like manner he abandoned his second replication, when he availed himself of the leave of the court, and filed a third and last one.

But the plaintiff insists that even if his replication was bad, still upon the whole record he was entitled to judgment, because the first and fourth pleas were undisposed of. If an issue in fact had been joined on the fifth plea, and found for the defendants, judgment was inevitable for them, because the plea was in bar of the action, and the other pleas would then have presented immaterial issues. If the plea was true, being a complete defence, it would have been useless to have tried other issues, for no matter how they might terminate, judgment must still be for the defendants. The state of pleading leaves the fifth plea, precisely as if traverse had been taken on a matter of fact in it, and determined against the plaintiff. "On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading and found in favor of the same party." Gould, Pl. c. 9, § 42. "And when the defendants' plea goes to bar the action, if the plaintiff demur to it and the demurrer is determined in favor of the plea, judgment of nil capiat should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action." Tidd, Prac. (4th Am. Ed.) 741–742.

There is no error in the record.

Judgment affirmed, with costs.

Consolidation with foreign corporation. Agreements between States. Co-operating and conflicting legislation of different States.

OHIO & MISSISSIPPI RAILWAY CO. v. PEOPLE.

(123 Ill. 467, 14 N. E. 874.)

Supreme Court of Illinois. Jan. 18, 1888.

Appeal from circuit court, Wayne county.

Ramsey, Maxwell & Matthews and Pollard & Werner, for appellant. George Hunt, Atty. Gen., for appellee.

SHOPE, J. This was an information in the nature of a quo warranto, filed in the Wayne circuit court, by the state's attorney of that county, against the Ohio & Mississippi Railway Company. A demurrer was sustained as to the first, and overruled as to the second and third, counts of the information, and as to such counts respondent answered. A demurrer to the answer being interposed and sustained, respondent refused to answer further, and was adjudged guilty, as charged in the second and third counts of the information, and a fine of $1,000 was thereupon imposed upon respondent. Motions for a new trial and in arrest of judgment having been overruled, the record is brought here upon respondent's appeal. It is charged in the information that the Ohio & Mississippi Railway Company is a corporation chartered, organized, and existing under the laws of this state, owning and operating a railroad in this state from East St. Louis to the Wabash river, opposite the city of Vincennes, Indiana, and from Shawneetown (through Wayne county) to Beardstown; that it is governed and controlled in its corporate capacity by a board of 13 directors, a majority of whom are not citizens and residents of this state, and 12 of whom are now and have been citizens and residents of other states, contrary to the laws of this state, whereby it has forfeited its franchise, powers, and privileges. By its answer the railway company denied that it was guilty of the several wrongs charged against it, admitted that it was incorporated under the laws of Illinois, and said that such corporation was made by virtue and in pursuance of an act of the legislature of Illinois, entitled "An act to incorporate the Ohio & Mississippi Railway Company, and for other purposes," approved February 5, 1861; that in the first section thereof, 13 persons were named incorporators of the company, and that a majority of the persons so named were non-residents of the state of Illinois, and were citizens and residents of other states; that by virtue of the same section of that act respondent was invested with all the corporate franchises and rights which had heretofore been granted to and vested in the corporation known as the "Ohio & Mississippi Railroad Company," incorporated by an act of the general assembly of the state of Illinois, entitled "An act to incorporate the Ohio & Mississippi Railroad Company, and for other purposes," approved February 12, 1851, referred to both these acts and made them parts of its answer, and insisted that, by virtue of these special acts in pursuance of which it was incorporated, it became vested with the right to elect a majority of its directors, or all of them, from stockholders residing outside of the state of Illinois, and not citizens of Illinois; that in 1867, and before the adoption of the present constitution of this state, by virtue of the laws of the state of Illinois, and of similar laws in the states of Indiana and Ohio, respondent became consolidated with the Ohio & Mississippi Railway Company, and owning and operating a railroad leading from the Mississippi river, at East St. Louis, Illinois, to Cincinnati, Ohio, all under one management and one board of directors, by which consolidation the property, stock, and franchises of the old constituent corporations named became completely merged in respondent,—its line of railroad being connected and continuous, and which consolidation was in all respects in conformity with the laws of the states of Illinois, Indiana, and Ohio; that its principal business as a carrier is between St. Louis, Missouri, and Cincinnati, Ohio; that its capital stock is held and owned, excepting a few shares, by persons outside of Illinois, being largely held in foreign countries and in New York; that now, and for some time last past, but one of its stockholders is or has been a citizen and resident of the city of Springfield, Illinois, and that all its other directors are citizens and residents of other states, (giving their respective places of residence;) "that the officers of respondent have always been of the opinion, and have been so advised, that under its charter and consolidation, by authority of the laws of this state, with said railroad corporation in the states of Indiana and Ohio, the law of this state requiring a majority of the directors to be citizens and residents of this state did not apply to respondent; that it has been supported in this opinion and belief by the fact that a majority of its directors have never resided in or been citizens of this state, which fact has been well known to the citizens and officers of this state, and to the relator in this proceeding, and still, until the filing of this proceeding, no objection has ever been made by either citizen, officer, or relator, and no injury has been sustained thereby by any one; that respondent has always acted in this matter in good faith, and with a desire to comply with the laws of the state as they were understood by its officers, and as they seem to be understood by the officers of the state."

The principal question here presented is whether the organic law of the state is applicable to appellant corporation. The consolidation mentioned was complete in 1867, and there was at that time, neither in the constitution of the state, nor on the statute-books, any provision requiring that a majority of the board of directors of corporations similar to the Ohio & Mississippi Rail-

way Company should be citizens and residents of this state. The provision of the present constitution which is said to be mandatory upon appellant, is as follows: "A majority of the directors of any railroad corporation, now incorporated or hereafter to be incorporated by the laws of this state, shall be citizens and residents of this state." It is insisted, and has been held, that the power given to a railway corporation to form a union or consolidation with another railway corporation is a contract between the state granting the power and the corporation, which, after the right of consolidation has been exercised, cannot be withdrawn or impaired by the state. Zimmer v. State, 30 Ark. 677. See, also, Banking Co. v. Georgia, 92 U. S. 665. In the view we entertain of this case it will not be necessary to discuss or determine the question whether appellant corporation acquired such rights by virtue of consolidation as would bring it within the inhibition of the constitution of the United States against the impairment of contracts by the state, and we therefore express no opinion in respect thereto.

The view of this case which we regard as decisive, involves a construction of this state constitutional provision, and the determination of the question as to whether appellant corporation falls within its letter or spirit. This will necessarily involve a consideration of the status of appellant corporation at the time of the adoption of the constitution now in force. The constitution was adopted in 1870, and the record leaves no question but that the consolidation of the Ohio & Mississippi Railway Company of Illinois with the corporation of the same name existing in the state of Indiana and Ohio was consummated in the year 1867. The Ohio & Mississippi Railway Company of Illinois was incorporated, by an act of the legislature of Illinois, in 1861. Priv. Laws 1861, p. 508. The object of the incorporation is declared to be "for the purpose of purchasing and taking a conveyance of all the railway property, real and personal, rights and franchises of the Ohio & Mississippi Railroad Company, incorporated by act of February 12, 1851, or in any part of said property, rights, and franchises, either by private contract, or at any judicial sale thereof," thereafter to take place. The grant was that "the said corporation shall possess all the powers and privileges conferred on the Ohio & Mississippi Railroad Company by the act incorporating the same, or by any amendment or amendments thereof, and shall be subject to all provisions of said act. * * *" Thirteen incorporators were named, from whom alone the first board of directors were to be selected, and who were not, as the answer avers, citizens and residents of the state of Illinois. The act of 1851, and which by reference in the act of 1861 is made the charter of the said Ohio & Mississippi Railway Company of Illinois, (Priv. Laws 1851, 89,) authorized the corporation to locate, construct, and maintain a railroad, with one or more tracks, from Illinoistown, on the Mississippi river, (now East St. Louis,) east to the Illinois state line, "in the direction of the city of Vincennes," in Indiana. The powers of the corporation were vested in a board of directors of not less than seven nor more than seventeen, and the first board of directors, composed of thirteen, were individually named. In addition to the other powers granted, it was provided that "said company shall have the power to unite its railroad with any other railroad now constructed, either in this state or the state of Indiana. * * *" Under its charter the Ohio & Mississippi Railway Company of Illinois organized and became the owner of the line of railway from East St. Louis to the Illinois state line opposite the city of Vincennes, in Indiana, and became vested with the powers, franchises, and privileges of the Ohio & Mississippi Railroad Company of 1851, and possessed and operated its railway to and until 1867. In the year last named the Ohio & Mississippi Company of Illinois become consolidated with the Ohio & Mississippi Railway Company, an Indiana corporation, and also with the Ohio & Mississippi Railway Company, an Ohio corporation, whereby the consolidated corporation, under the common name of the Ohio & Mississippi Railway Company, became the owner and operated a consolidated and continuous line of railway from East St. Louis, in Illinois, to Vincennes, in Indiana, and thence eastward to the city of Cincinnati, in Ohio, and the property, stock, and franchises of the three constituent corporations in the three states became merged in the consolidated corporation, the corporate powers of which were exercised by one management and a single common board of directors. And the right of the Illinois corporation thus to consolidate its property, stock, and franchises with corporations in the states of Indiana and Ohio was acquired and exercised, as the answer avers, under and in conformity with "the laws of the state of Illinois, and of similar laws of Indiana and Ohio." "The laws of the state of Illinois" here referred to are: (1) The act of 1851, before referred to, and which, by reference and adoption, became the charter of the Ohio & Mississippi Railway Company, incorporated under the act of 1861, except as the same was modified by the latter act, in which, as we have seen, the Ohio & Mississippi Railroad Company was authorized and given power "to unite its railroad with any other railroad now constructed, either in this state or the state of Indiana; * * *" and (2) the act of February 28, 1854 (Laws 1854, p. 9; 1 Gross, St. p. 537, § 15 et seq.) Under this latter act railroad companies then or thereafter organized, having their termini fixed by law, and whose roads intersected by a continuous line, were "authorized and empowered to consolidate their property and stock with each other, and to consolidate with companies out of this state wherever their lines connect with the lines of such companies out of this state." The consolidating

companies might, it was provided, agree upon a name "of such consolidated company," and by such name should be "a body politic and corporate," having a common seal, and in such corporate name contract and be contracted with, sue and be sued, plead and be impleaded, and "have all the powers, franchises, and immunities which the said respective companies shall have by virtue of their respective charters before such consolidation * * *." It seems clear to us that, under this latter act, railroad companies organized under the laws of this state, and whose lines of railway so intersect as to constitute a continuous line within this state, might consolidate their property, stock, rights, and franchises, and thereby constitute a new corporation, under a new name, possessing the property, rights, powers, and franchises of the constituent companies as given by their charters; and that upon the consummation of such consolidation, the constituent companies as independent legal entities would cease to exist; and that all the duties and obligations of the constituent companies, whether to the public or to private persons, would be cast upon and must be assumed and discharged by the new consolidated corporation. The power of the state to authorize the consolidation of corporations of its own creation, with the effect stated, has everywhere been admitted, and many cases are to be found in the books where this principle is recognized. See Ruggles v. People, 91 Ill. 256, (affirmed by the supreme court of the United States, 108 U. S. 526, 2 Sup. Ct. 832;) Shields v. Ohio, 95 U. S. 319; Bishop v. Brainerd, 28 Conn. 289. But does a like power exist in two or more states, in respect of railway corporations incorporated by them respectively, to authorize the consolidation of such corporations? If so consolidated, by authority of the states of their creation respectively, what legal result follows? Is the consolidated corporation a new corporation, or only an association of corporations under a common name? If the result be the creation of a new corporation, do the original corporations cease to exist? What property, rights, powers, and franchises does the new corporation acquire, and what duties, obligations, and liabilities to the respective states does it assume?

This court has, in the following cases, had occasion to express itself as to the effect of such consolidations; but in every instance the question has arisen collaterally and not in a direct proceeding. The Quincy Bridge Company was incorporated by the state of Illinois, and also by the state of Missouri, for the common purpose of the construction of a bridge across the Mississippi river. The two companies entered articles of consolidation, which were legalized by the legislature of Illinois. In speaking of such consolidation, this court, in Bridge Co. v. Adams Co., 88 Ill. 615–619, said: "The legislatures of this state and of Missouri cannot act jointly, nor can any legislation of the last-named state have the least effect in creating a corporation in this state. Hence, the corporate existence of appellants, considered as a corporation of this state, must spring from the legislation of this state, which, by its own vigor, performs the act. The states of Illinois and Missouri have no power to unite in passing any legislative act. * * * The only possible status of a corporation acting under charters from two states is that it is an association incorporated in and by each of the states, and, when acting as corporation in either of the states, it acts under the authority of the state in which it is then acting, and that only,—the legislation of the other state having no operation beyond its territorial limit." This was said, it must be observed, in a case where the question was whether the capital stock of the corporation was subject to taxation under the revenue laws of this state. And it was there held that the Bridge Company was a corporation within this state, within the meaning of the laws of this state imposing taxation upon domestic corporations. It does not appear from the case as reported whether the capital stock which it was sought to bring under the operation of our revenue law was that which had been issued by the consolidated corporation; or, indeed, whether the articles of consolidation contemplated such an issue. Nor is it in any way important. The language employed by the court, however, negatives the idea that the effect of the consolidation was the creation of a new corporation, and affirms the doctrine that the consolidation was but an association of the two constituent corporations, the contracting corporations retaining their legal existence and identity. It could, however, as affecting the question under consideration in that case, as we shall hereafter see, be of no importance whether a new corporation was created by the act of consolidation or not.

This court also had before it the case of Racine & M. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331, involving the validity of a mortgage executed by the consolidated corporation upon the property in both states. The Racine, Janesville & Mississippi Railroad Company, incorporated by Wisconsin, was consolidated with the Rockton & Freeport Railroad Company, incorporated by Illinois. The latter corporation was, by its charter, authorized to consolidate its stock with that of any Wisconsin corporation. The object of the consolidation was by the articles of consolidation declared to be "to fully merge and consolidate the capital stock, powers, privileges, immunities, and franchises of the two corporations." After consolidation, the legislatures of the two states changed the names of the constituent corporations respectively to the Racine & Mississippi Railroad Company. Afterwards, another Illinois corporation, the Savanna Branch Railroad Company, became a party to the consolidation, and the legislature of Illinois changed its name to the Racine & Mississippi Railroad Company, and declared the several acts of consolidation le-

gal and binding. In that case it was said: "Our view of the effect of the consolidation contract between the Rockton Company and the Wisconsin Company, which we hold to have been legally made, is briefly this: While it creates a community of stock, and of interest, between the two companies, it did not convert them into one company in the same way and to the same degree that might follow a consolidation of two companies within the same state. * * * But the contract of consolidation, and the subsequent legislation, created substantially a new corporation with a new name; but such corporation, in a legal point of view, was and has remained a distinct corporation in each state, though the two have a common name, common stock, and a common board of directors. There is a Wisconsin corporation under the name of the Racine & Mississippi Railroad Company, and there is an Illinois corporation of the same name, and the original corporations in each state have been transmuted into these." And upon this view the validity of the mortgage was sustained. It is apparent that precisely the same result was reached as if the court had held that a new corporation had been created by the articles of consolidation. We do not therefore consider the case as in conflict with the views hereafter expressed. The position assumed by the court in the cases referred to, that a corporation cannot be created by the joint legislation of two states so as to be the same legal entity in both states, may be conceded. Joint acts of legislation by two or more states are impossible; and one state cannot, without the consent of congress, "enter into any agreement or compact with another state." Const. U. S. art. 1, § 10, cl. 3. But it does not follow, as is assumed in the case last referred to, that a corporation, de jure as well as de facto, cannot be created with the consent and under the authority of two or more states, by the voluntary consolidation of corporations created and existing by virtue of the laws of such states respectively. The contrary view seems to have been entertained by this court in the last case before it, (Cooper v. Corbin, 105 Ill. 224--231,) where it was said: "The Indianapolis, Bloomington & Western Railway Company was formed by the consolidation of the Indianapolis, Crawfordsville & Danville Railroad Company, a corporation created under the laws of Indiana, and the Danville, Urbana, Bloomington & Pekin Railroad Company, a corporation organized under the laws of this state. The consolidation was effected in conformity to the charter of the last-named company and the laws of this state, and the new corporation, by virtue of the consolidation, became clothed with all the rights, privileges, and powers which had been conferred by the laws of the state upon the Danville, Urbana, Bloomington & Pekin Railroad Company." In this case, as in the Quincy Bridge Company Case, none of the adjudged cases are referred to, and the court had no apparent intention of laying down a rule which should bind the court in a direct proceeding, such as the one now under consideration. We have, therefore, felt at liberty to consider the authorities. A careful examination has satisfied us that the current and weight of authority establish the principle that, upon the consummation of such consolidation, authorized by the laws of the states creating the constituent corporations, a new corporation will be created. Railway Co. v. Berry, 113 U. S. 465, 5 Sup. Ct. 529; Shields v. Ohio, 95 U. S. 319; Graham v. Railroad Co., 118 U. S. 161, 6 Sup. Ct. 1009; Bridge Co. v. Mayer, 31 Ohio St. 317; Bishop v. Brainerd, 28 Conn. 289; 2 Mor. Corp. §§ 1000, 1001. The acts of the states authorizing and consenting to the consolidation are acts of incorporation. State v. Maine Cent. R. Co., 66 Me. 488, (affirmed by the supreme court of the United States, 96 U. S. 499.) And the new corporation will possess, necessarily, every requisite corporate attribute. Its capital stock, corporate name and organization, board of directors, officers, and managers will be such as may be authorized by the articles of consolidation and the acts of the respective states. The new corporation will, as was said in Minot v. Railroad Co., 18 Wall. 206, become vested with "the rights and privileges which the original companies had previously possessed under their respective charters,—the rights and privileges in Maryland which the Maryland company had enjoyed, and the rights and privileges in Delaware which the Delaware company had there enjoyed,—not to transfer to either state and enforce therein the legislation of the other. * * * The new company stood, in each state, as the original company had previously stood in that state, invested with the same rights and subject to the same liabilities." Unlike a corporation created by a single state, which cannot migrate or legally exist outside of the territorial limits of the state of its creation, the consolidated corporation, having a capital stock which is a unit, and only one set of stockholders, who have an interest by virtue of their ownership of shares of such stock in all its property everywhere, and a single board of directors, will have its domicile in each state; and the stockholders, directors, and officers can, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in either of the states; though, in its relation to either state, the consolidated company will be a separate corporation, governed by the laws of that state as to its property therein, and subject to taxation in conformity with the laws of such state, and to all the police power of the state in respect of its property and franchise within such state. Graham v. Railroad Co., 118 U. S. 161, 6 Sup. Ct. 1009; Bridge Co. v. Mayer, 31 Ohio St. 317; Sprague v. Railroad Co., 5 R. I. 233; Pierce, R. R. 20; Minot v. Railroad Co., supra. And the same rule, as to domicile, seems to apply to a case where two corporations are created by adjoining states for the improvement of a

river forming the common state boundary. "Under the joint act of two states, the powers conferred to be exercised for the benefit of both may be exercised in either. The act does not require the business to be done in either state, as regards the action of the directors; the work is to be done in both." And so it was held the corporation might be sued in either state. Culbertson v. Navigation Co., 4 McLean, 544, Fed. Cas. No. 3,464. And to the same effect is Chicago & N. W. R. Co. v. Chicago & P. R. Co., 6 Biss. 219, Fed. Cas. No. 2,665.

Whether, upon the creation of the consolidated corporation, the constituent corporations of the different states cease to exist, the authorities are, in the main, agreed. They do not necessarily cease to exist, although they lie dormant, and their property, rights, powers, and franchises are possessed and exercised by the new consolidated corporation. Farnum v. Canal Co., 1 Sumn. 62, Fed. Cas. No. 4,675; Tagart v. Railway Co., 29 Md. 557; Banking Co. v. Georgia, 92 U. S. 667. "In regard to the effect of such a consolidation, it does not necessarily follow that it would extinguish, to all intents and purposes, the existence of those corporations. It is possible for them still to subsist for certain purposes, notwithstanding they should be thus amalgamated." Bishop v. Brainerd, 28 Conn. 289. If we are correct in this, upon the consummation of the consolidation in 1867 of the three companies named into appellant corporation, it became a new corporation, existing, by virtue of the act of consolidation, under the sanction and by the authority of the three several states in which the constituent companies had been chartered, while its charter privileges, powers, and obligations within the state of Illinois were prescribed and limited by the charter of the Illinois corporation entering into the consolidation. While therefore, in a sense, it may be said that appellant is incorporated under the laws of this state, it must also be said it exists by virtue of the laws of the states of Illinois, Indiana, and Ohio, authorizing and consenting to its organization. The corporation chartered by the act of 1861 was merged in the consolidation of 1867; and its right to exercise corporate functions must lie dormant, at least during the existence of the consolidation. This was the status of appellant, and of the constituent company in Illinois, at the time of the adoption of the constitutional provision before referred to and quoted.

This constitutional provision, by its terms, applies only to such railroad corporations as are "now incorporated or hereafter to be incorporated by the laws of this state." It would seem that no construction of these words was necessary to demonstrate the inapplicability of the constitutional provision to appellant corporation, or those standing in like relation to the state. It is insisted, however, by appellee, that as appellant corporation derives its vitality from the act of the state consenting to the consolidation, and its charter powers and duties within this state are measured by the act of 1861, creating the Ohio & Mississippi Railway Company of Illinois, it falls within the spirit of the constitution, and must, therefore, have a majority of its board of directors citizens and residents of this state. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. This intent is to be found in the instrument itself from the words and phrases employed. The presumption is that the language employed was intended to have its ordinary and usual meaning, and to be sufficiently perspicuous within itself to convey the intent. And "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." U. S. v. Fisher, 2 Cranch, 358; Cooley, Const. Lim. 68. And it is only when, after a consideration of the language employed, there are still doubts and ambiguities as to the meaning of the lawmaking power, that extrinsic circumstances may be resorted to in aid of construction. As has been seen, appellant corporation is no more a corporation existing under the laws of Illinois, than it is a corporation chartered by the laws of Indiana or of Ohio. To hold that the constitutional provision is applicable to appellant corporation, would be to determine that the framers of that instrument, in drafting and submitting this section, and the people in adopting it, intended that the state of Illinois should break faith with her sister states, and should become a despoiler of private right; for, on the faith of the legislation of Illinois, the other states had, by like legislative action, authorized corporations existing as domestic corporations in those states to unite their property and franchises with a corporation of this state, whereby both public and private rights were greatly affected. Upon the consummation of the consolidation, bonds and stocks of the new consolidated corporation were issued, secured by mortgages upon the consolidated line, its property and franchises, and the liens on the constituent lines discharged. The terms and conditions of the articles of consolidation are not set out in the answer; but it is manifest, from what is disclosed, that the legal effect of the consolidation, which it is averred was consummated, was to transfer to the new corporation the property of the three constituent companies wherever it might be located. When the new corporation issued its stock, it was put upon the markets of the world, and the persons becoming owners thereof acquired an interest, measured by the shares of stock owned by them respectively, in the franchise and property of the new corporation. No restriction was placed upon its ownership, and all persons everywhere were at liberty to acquire it. Although the corporation was a

quasi public one, its property was the property of its stockholders, and subject to the general regulation and police power of the states in which the corporation was situate. The owners of the railway property stood on an equal footing with the owners of other species of property as to its right of control and management. An essential element of the consent and authority given by the state to the consolidation was the right of the Illinois corporation to acquire, under the laws of the other states named, an interest in property situate beyond the limits of this state, and forming an integral part of a great railway thoroughfare, with a right to issue its bonds and stock, based on the property of the railway in the three states, whose domestic corporations were the constituent elements of such new company. The object to be attained was the corporate union of properties and interests in different states, under the management and control of a single board of directors, thereby securing the concerted and harmonious operation of a through line of railway from St. Louis to Cincinnati. If effect is to be given to the words of the constitution as contended by appellee, the consolidated corporation must necessarily be dissolved, unless the states of Ohio and Indiana acquiesce in the assumption by this state of jurisdiction over the personnel of the directory; and, also, unless the owners of appellant's stock consent to become citizens and residents of Illinois in sufficient number to constitute a majority of the directory, and a majority of the stockholders consent to commit the interests of the corporation to such resident stockholders. If all this could not be attained, appellant must forfeit its charter in this state, and its property here as well as its interest in this continuous line of railway be lost to those interested therein. Such construction would place this state in the condition of repudiating its acts, upon the faith of which sister states have acted, and upon which private interests have been acquired. And although states may not enter into formal treaties and conventions, or agreements and compacts, they may, and we venture to say should, be exemplars of good faith and fair dealing, by faithfully observing such obligations as legitimately spring from their cooperating legislation. The framers of the constitution must be presumed to have known of the status of appellant and its relation to the state at the time the language referred to was selected, and if they had intended the dissolution and destruction of appellant corporation as then existing, it is also to be presumed they would have used language expressive of such intent. The language employed applies only to corporations existing by virtue of the laws of this state, and finds ample scope for application to the multitude of corporations thus existing. No reason has been suggested, nor has any occurred to us, for extending the language of this constitutional provision beyond its plain and obvious meaning; and especially would this be so, in view of the results that would follow the more latitudinous construction contended for by appellee. What would be the effect upon like corporations brought into existence since the declared policy of the state, as expressed in this constitutional provision, is not before us, and need not be discussed or determined.

We are of opinion that appellant corporation does not fall within the constitutional provision quoted, and that the circuit court, therefore, erred in sustaining the demurrer to the answer, and in rendering judgment against appellant. The judgment will therefore be reversed, and the cause remanded.

SCOTT, J. I am not prepared to concur in this opinion.

MAGRUDER, J. I do not concur in this opinion. The doctrine which it announces is, to my mind, an exceedingly pernicious one. The tendency of its reasoning is to exonerate railroad companies from their obligations to obey the laws and constitutions of the individual states if they make arrangements for consolidating and uniting their lines with railroads in adjoining states. Our constitution of 1870 says: "A majority of the directors of any railroad corporation, now incorporated or hereafter to be incorporated by the laws of this state, shall be citizens and residents of this state." The meaning of these words is plain. The idea conveyed by them is as clearly expressed as any idea can be expressed by human language. The Ohio & Mississippi Railway Company was a railroad corporation, incorporated by the laws of this state when the constitution of 1870 was adopted. In my opinion it should be required to obey the mandate of the organic law as above quoted. The charter granted to it by the state of Illinois in 1861 contained no provision that a majority of its directors might or should be non-residents of this state, or citizens and residents of other states than Illinois. There was no contract between it and the state of Illinois that a majority of its directors should be citizens and residents of other states. The existence of such a contract cannot reasonably be presumed, either from the fact that a majority of the original incorporators named in the charter happened to be non-residents of Illinois, or from the fact that there was, in 1867, a consolidation with other roads in adjoining states under legislation, then existing, which permitted such consolidation. Therefore it cannot be said that the enforcement of the constitutional provision against appellant will impair the obligation of a contract. If the views of this decision are to prevail, then any corporation can defy the constitution and laws of the state which gives it its existence by uniting itself to some corporation in another state, and then claiming to be the creature of two states.

Cf. Atwood v. Shenandoah Valley R. R. Co., 85 Va. 966, 989, 9 S. E. 748.

Fiduciary position. Public policy. If cestui que trust repudiates act of trustee, he cannot retain benefits received. Collateral security to director. Buying bonds of company below par. Notice to purchaser. Pledgee. Authority of company to issue bonds. Foreclosure. Proof of mortgage debt. Bondholders' rights. Security for void note. Bond pledged for salary and office rent. Irregular sale by pledgee. National banks: unlawful contracts.

DUNCOMB et al. v. NEW YORK, HOUSATONIC & NORTHERN R. R. CO. et al.

(84 N. Y. 190.)

Court of Appeals of New York. March 1, 1881.

Appeals from order affirming, reversing and modifying certain portions of an order.

Action to foreclose a mortgage executed by the defendant, the New York, Housatonic and Northern Railroad Company, to plaintiffs as trustees for bondholders.

A referee was appointed to ascertain the amount due on account of the bonds and the nature and extent of the interest of the bondholders and to report with the evidence.

It appeared that a corporation was organized under the general railroad act in 1863, having the same name as the corporation defendant. Said corporation in 1868, made its mortgage to plaintiffs as trustees for $2,500,000. In 1872, said corporation was consolidated with the Southern Westchester Railroad Company into the corporation defendant. In October, 1872, it made a mortgage for $2,000,000 and exchanged its bonds secured thereby to the amount of about $183,500, for bonds issued for the old corporation.

The referee found, as to the claims of Louis D. Rucker, that he produced bonds to the amount of $1,117,000. That $810,000 of these bonds were issued to him, as security for previous advances by him to said railroad company, amounting to $81,000. That $250,000 of said bonds were issued to the New York Loan and Indemnity Company as collateral security for a loan of $25,000. That the claim of said New York Loan and Indemnity Company was placed in judgment against the railroad company, and the said judgment was assigned to Rucker for $12,500. That the balance of said bonds were obtained by Rucker from the Bessemer Company, never having been issued to him or delivered to him by the railroad company, but were taken and held by him as security for certain advances made by him from time to time. These advances were made on the joint obligations of the railroad company and the Bessemer Company, the latter having a contract for the construction of the road of the former. At the time of these advances Rucker was president of the railroad company. The referee held that Rucker was entitled to prove said $810,000 of bonds only to the extent of his claim of $81,000 and interest thereon. That he was entitled to prove the bonds assigned to him by the loan and indemnity company only to the extent of the $12,500 paid by him with interest. That the balance of bonds claimed by him were of no value in his hands and he was not entitled to receive any payment thereon. The other facts are set forth in the opinion.

John M. Whiting and Henry W. Johnson, for plaintiffs. Jesse Johnson and E. Ellery Anderson, for defendants.

FINCH, J. It is not possible in this case to go much beyond a brief statement of our conclusions. To discuss all the questions raised by the numerous appeals, through their voluminous and complicated details, would prolong an opinion beyond what is either necessary or profitable.

We have reached the conclusion that the appellant, Rucker, should be allowed to prove in full all of the $810,000 of bonds, which he holds as a pledge, to secure the debt due him from the railroad company of $81,000 and interest, and which he can produce for that purpose; and is entitled to share in the distribution upon that basis to the extent of such indebtedness. It is not intended to deny or question the rule that whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation and not for his own private interests, and that he falls therefore within the doctrine by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf, in respect to any matter involving such confidence. Hoyle v. Railroad Co., 54 N. Y. 328; Gardner v. Ogden, 22 N. Y. 327; Twin Lick Oil Co. v. Mabury, 91 U. S. 587; Smith v. Lansing, 22 N. Y. 531; Railway Co. v. Blaikie, 1 Macq. 461, per Lord Cranworth. Nor is it at all questioned that in such cases the right of the beneficiary or those claiming through him to avoidance does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly, but is founded upon the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character. Davoue v. Fanning, 2 Johns. Ch. 260. But the rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent. Thus, the beneficiary may avoid the act of the trustee, but cannot do so without restoring what it has received. York Co. v. Mackenzie, 8 Brown, Parl. Cas. 42. To cling to the fruits of the trustee's dealing while seeking to avoid his act; to take the benefit

of his loan, and yet avoid and reverse its security, would be grossly inequitable and unjust. It would turn a rule designed as a protection into a weapon of offense and injustice. And where the trustee's act consists, not in possessing himself of the property of the beneficiary as owner, but in taking collateral security for a debt honestly due him, or a liability justly incurred, the rule can have no application, since the payment of the debt or the discharge of the liability is an essential prerequisite of the avoidance. And this is true whether the pledge be taken for a present or precedent debt. In either case the equity to be regarded equally exists. It is upon this ground that the case of Smith v. Lansing, 22 N. Y. 520, stands. The collateral taken there was after the creation of the liability, and we held the transaction valid. The ground of the decision was distinctly stated to be that the association had received the direct benefit of the several amounts of money to secure which the bonds were given, and the creditors had indirectly received the benefits of the same by the consequent increase of the assets; and that, upon the application of the beneficiary or its receiver, the trustee should be permitted to set up any equities which existed, entitling him to retain the property, either absolutely or as security for the moneys advanced or liabilities incurred. Since therefore, in the case of a pledge delivered as security for a just and honest debt, the principal may always redeem upon payment, and the rule of equity is in no respect different, we do not see that it has any application, or can in any respect modify the legal relation of the parties.

The pledge of Rucker and its validity is however attacked from another and a different direction. It is argued that the right to make the mortgage under which the bonds were issued is given by the statute (Laws 1850, c. 140, § 28, subd. 10), and is limited to an authority, "from time to time, to borrow such sums of money as may be necessary for completing and finishing, or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid." It is then argued that the railroad corporation had no right to pledge its bonds as security for a precedent debt, as was done in the present case. But if the precedent debt was contracted in the process of borrowing money for the construction or operation of the railroad, we do not see that the purpose of the statute is at all violated or avoided. Its terms do not require that the borrowing and the issuing of the bonds should be simultaneous acts. The former may naturally and properly precede the latter. In the present case there is neither proof nor intimation that the loan of Rucker was for a purpose outside of the statute, but on the contrary all the facts indicate that the money he advanced went actually into the construction of the road.

We conclude therefore that he is entitled to prove so many of the $810,000 of bonds as he holds, and can produce as pledgee, and share in the distribution accordingly up to the amount of his debt.

It was error to reject the bonds held by Rucker as the assignee of the loan and indemnity company, and those which he received as a pledge from the Bessemer Company. The transactions relating to these bonds occurred after he had ceased to be an officer of the railroad company, and when he occupied toward it no relation of trust or confidence which could, on any theory, expose his action to scrutiny or criticism.

He dealt therefore like any other stranger, and is entitled to prove such of these bonds as he holds as pledgee and can produce for that purpose, and receive the dividends thereon to the amount of the debts respectively which the bonds were pledged to secure.

The objection made to the title of the loan and indemnity company that it violated the law in discounting the note of $25,000, and so the pledge falls with it (Rev. St. pt. 1, tit. 20, c. 20, §§ 1, 5), is answered by a reference to the charter of the company (Laws 1870, p. 1803), which authorized it to "advance moneys, securities and credit upon any property, real or personal," and by our recent decisions that even if the note discounted was void, the loan and its security were valid and capable of being enforced. Pratt v. Short, 79 N. Y. 437; Pratt v. Eaton, 79 N. Y. 449.

We see no reason to disturb the conclusion arrived at by the referee and affirmed by the general term as to the bonds of Henry W. Johnson, amounting to $40,500. His ownership is assailed by Rucker, who claims that he lacks forty-two bonds of those originally pledged to him, and that they now appear in Johnson's possession. The latter received them from one Ball, who was a contractor, and who got them from the railroad company in settlement of his account. As Rucker at one time surrendered his pledged bonds, and devoted them to the construction of the road, so that it was possible for Ball to receive them rightfully, we do not see that the title of Johnson is imperfect, or that Rucker has established any paramount claim.

Artemas S. Cady was found by the referee to be the owner of $31,000 of the bonds, and the pledgee of $34,000 more, which last were held as collateral to a loan of $5,000 and interest. The loan was through the Bessemer Company, to whom the bonds had been promised upon their contract for construction. The referee allowed the bonds owned to be proved in full, and those held in pledge also in full, but limited the dividend thereon to the amount of the loan and interest.

Inadequacy of consideration, and an alleged inability of a railroad corporation to

apply its bonds by way of pledge, at least as security for a precedent debt, were the only grounds of objection urged. We do not think they are sound. Since Cady was neither officer nor director, and owed no duty by virtue of such relation to either the Bessemer Company or the railroad, he had unquestionably the right to take as large a "margin" for his loan as the borrower was willing to grant. Nor can we discern any valid reason why a railroad corporation may not dispose of its bonds by way of pledge as well as of sale, and in the absence of proof that the proceeds of the loan were, with the knowledge of both parties, to be applied to some purpose not authorized by the statute permitting their issue, we can see no reason, as has already been said, why they might not be used as a pledge to secure an indebtedness already existing. We agree therefore as to these bonds with the conclusion of the referee.

Charles D. Bailey bought $10,000 of the bonds of the old company from E. F. Mead, who was at the time one of its directors. After the consolidation Bailey was allowed, upon the surrender of his old bonds, to receive an equivalent amount of the new ones. It is objected that Mead bought these bonds of his company at fifty-one cents on the dollar, which is probably true; that being a director he could not thus buy below par except at the peril of avoidance by the courts upon the application of the corporation, which must be conceded (Coal Co. v. Sherman, 30 Barb. 565; Butts v. Wood, 37 N. Y. 317; Coleman v. Railroad Co., 38 N. Y. 201); that his title was therefore defective, which as between himself and the company, may be granted; and that Bailey, being also a director, was not protected in his purchase. The difficulty is an utter absence of proof as to the last material fact. We do not know the date of Bailey's purchase. It may have been before he was elected director. If so, there was nothing to affect his position as a purchaser for value and in good faith, unless the fact that he knew Mead to be a director was enough to put him on inquiry and charge him with constructive notice of the defect in the title. We cannot so decide. A director may be the lawful and honest holder of the bonds of his company. Harpending v. Munson, 91 N. Y. 652. There is no presumption to the contrary. The fact is not even just ground of suspicion. The referee therefore properly allowed the $10,000 of bonds to be proved in full. As to the remaining $1,500 our conclusion is different. They were plainly a bonus, taken by Bailey, while a director, on his stock subscription, and for which he paid nothing. His attempted reversal of the process is wholly ineffectual in the face of the proved action of the company authorizing the bonds to be given as a bonus, instead of the stock. We cannot sustain this transaction. Very likely the stock was worthless, but that does not palliate or excuse the proceeding. It is true the bonds were exchanged for those of the new company, and that fact is relied upon to make him a holder for value and as a ratification by the company. But either view is answered by the fact that he was a director when the exchange was authorized and when it was made. He had the power and the opportunity to aid in an effort to ratify his previous wrong, while his obvious duty as an official was exactly the reverse. He had full knowledge of all the facts and did not act in good faith. The $1,500 of bonds therefore cannot be proved.

These views involve in the same fate the bonds of both Hall and Benedict. They each received their bonds as a bonus while they were directors of the company, and remained such when the new bonds were made and authorized to be exchanged. It is said in the opinion of the general term that the bonds of Hall were not disputed. That is a mistake. Their allowance by the referee was expressly excepted to on behalf of Rucker.

The bonds of Austin Stevens were properly allowed to be proved. He bought them of Duncomb who was a director, and whom he knew to be such, but did not know how Duncomb obtained them, or of any defect in his title.

Those of Daniel H. Temple for $5,000 were allowed by the referee but rejected by the general term. They were taken by him of Duncomb in pledge for a precedent debt. As a consequence he cannot be deemed a holder for value, and must be held to have taken no better title than that of his pledgor. Taft v. Chapman, 50 N. Y. 445; Coddington v. Bay, 20 Johns. 645; Stalker v. McDonald, 6 Hill, 93; Weaver v. Barden, 49 N. Y. 286. The title of Duncomb was vulnerable. He got his original bonds from the company, partly for alleged salary, partly at fifty-one cents on the dollar, and partly as a bonus for stock subscription. He was a director in the old company while thus obtaining the bonds and a director in the new company when the exchange of securities was made. His title therefore was bad and that of his pledgee must fall with it.

As to the bonds of Joshua C. Saunders, there appears to be no doubt that he was the actual owner and holder of $6,000 of them. The referee so finds, and the evidence warrants his conclusion. The balance of $21,000 were held by him as collateral to a note of $1,000. Pending the inquiry before the referee the pledge was foreclosed by a sale at auction, and Saunders testifies that through such sale he became the owner. His testimony is, "these bonds I now own by sale under the power given in the note under which they were hypothecated." That is all we know about it. What the terms of the note were; whether before sale there was a demand of payment and opportunity to redeem (Milliken v. Dehon, 27 N. Y. 364; Lawrence v. Maxwell, 53 N. Y. 19); whether the sale was on notice or not, and who became

the purchaser, we are left to imagine. We are perhaps bound to assume from what is shown that he bought them in at the sale. He does not assert any other or different title. If so, he must still be treated as pledgee since he had no right to buy. Bryan v. Baldwin, 52 N. Y. 232. The referee correctly decided that these bonds held as collateral could be proved in full, but the dividend payable upon them should be limited to the amount of the debt. The pledge appears to have been for the present advances, so that Saunders was a holder for value. Durbrow v. McDonald, 5 Bosw. 130; Winne v. McDonald, 39 N. Y. 233; McNeil v. Bank, 46 N. Y. 325. The modification by the general term which tended to destroy his margin was erroneous.

In the case of the National City Bank we think the referee was wrong, and the modification made by the general term was also erroneous. The bank loaned $35,000 to George W. Mead, who at the time was a director in the railroad corporation, and known to be such, taking $70,000 of the bonds as collateral. There is no proof that the bank or any of its officers had any knowledge of a defect in his title. That they knew him to be a director was not enough, as we have already said, to put them on inquiry. It is further claimed however that the bank, having a capital of $300,000, violated the law in making its loan to Mead of $35,000. Rev. St. U. S. §§ 5200, 5239, "National Bank Act." The penalty of such violation is fixed by the act itself, and consists in proceedings against the franchise of the bank, and a liability for damages of the offending officers. As to this question, which arises under the federal law, and respects corporations created by its authority, we must follow the rulings of the federal courts, and those determine very clearly that the contract of loan was not invalid but may be enforced. Gold Min. Co. v. National Bank, 96 U. S. 640.

As to the claim of John J. Studwell for $70,000 of bonds, we must be guided by the findings of the referee, that Studwell, by assignment from Cornell, the Park Bank and the National Citizens' Bank, acquired their rights to the debts held by them respectively, and the bonds pledged as collateral. His title as pledgee, derived from these sources, has not been successfully attacked; and the referee, instead of limiting him to the proof of bonds equal to the debts secured, should have allowed him to prove all the bonds and receive a dividend thereon to an amount not exceeding the amount of the debts for which they were held as collateral.

The claim of the East River National Bank should be corrected in the same way. It should be allowed to prove all its bonds and share in the distribution to the amount of the debt for which it holds them as security.

The bonds of Eliza Hatfield, held by her to the amount of $20,000, were allowed by the referee to the extent of $2,137, and no more. This was the amount found due upon the debt for which the bonds were held as collateral. The referee's finding was corrected at special term, in accordance with the exception filed on the claimant's behalf, and it was determined that she held $13,000 of the bonds as collateral, and should be entitled to receive their proper dividend up to the sum of $2,352.65, and owned $8,000 of said bonds absolutely. There is evidently still an error, for the two sums make $21,000 of bonds instead of $20,000, which was the whole amount. On examining the exception, which was allowed by the special term, it is evident that the collateral bonds were 1,087 to 1,098, both inclusive, or $12,000 instead of $13,000. On this claim therefore the $8,000 of bonds should be proved in full, and also the remaining $12,000; but on these last no dividend should be paid beyond the sum of $2,352.65.

The bonds of George W. Mead, to the amount of $19,500, were disallowed by the referee, but allowed by the general term, at the amounts said to have been actually paid by him. The evidence leads us to prefer the conclusion of the referee. It is extremely doubtful whether Mead paid anything whatever for the bonds. His position as director, and the manner in which he sought to use it for his own benefit, make it very clearly our duty to avoid the whole transaction and affirm the conclusion of the referee.

As to the Grocers' Bank, it is conceded by the counsel for the receiver that we can do no more than affirm the conclusion of the general term.

The claim of William R. Kirkland was rejected both by the referee and the general term. He was elected president of the railroad company in 1873 and his salary fixed by a resolution of the board of directors at $5,000 per annum. The company failed to pay and gave him its notes for $3,500 and $7,000 of the mortgage bonds as collateral. The salary was honestly due. It was a just debt against the company. The latter has no possible ground of defense against it. Why might not such a debt, fairly and honestly incurred, in the absence of means of payment, be secured by the pledge of the bonds? Grant that the creditor's official position should awake scrutiny and sharpen criticism. Yet the right of the officer to a fair compensation which has been honestly earned is as clear as that of a stranger. His services were as necessary to the construction of the road as those of the laborer who laid the rails. The president took the bonds merely in pledge. The right of redemption remained. The company could at any time have repossessed its bonds upon the condition, surely equitable, of paying the debt it owed. No undue or improper advantage was obtained. We are of opinion therefore that Kirkland is entitled to prove his bonds, and share in the distribution on that basis.

The Seaman's Bank for Savings also appeals from the order which excludes it from the benefit of $2,000 of bonds held as col-

lateral. It appears that the company was indebted to the bank for rent, and these bonds were turned out as security. The bank had the right to demand and receive them. No possible ground of objection occurs to us except an assertion that such use of the bonds was not justified by the lawful purposes of their issue, and the perversion was of course known to the pledgee. But such a construction would be altogether too rigid and narrow. A business office was essential and necessary and fairly embraced within the authority to issue bonds for the purpose of building, operating and maintaining a railroad. It was a necessary and indispensable aid to the end sought to be accomplished. As the bank was merely a creditor, it had the right to insist upon security for its rent, and having received a pledge of the bonds, to hold them, and prove them to their full amount, and receive a dividend thereon, not exceeding the amount of their debt.

We are satisfied with the conclusion reached as to the bonds of Mordecai M. Smith. As to $9,000 of them he was found to be purchaser and owner and permitted to prove them as such. As to the larger amount, all parties seemed to concur in treating the alleged title of Wiley, obtained upon a sale of collateral at auction, as not affecting results. To give it effective force in the absence of definite proof as to its regularity and propriety, and under the circumstances of suspicion which surround it, would hardly be justifiable; and since all his rights were assigned to the parties for whom he evidently acted, it is proper to dismiss it from consideration, and treat the case as if he had not intervened. The firm of Mead & Clark made certain advances to the railroad company upon the faith of these bonds pledged with them as collateral security. Since both were directors the transaction, even if open to criticism, and liable to avoidance, was modified by the further fact that the bonds were pledged for actual advances, and therefore the avoidance could only be made upon condition of the repayment of the advances. Mead & Clark could assign to Smith their debt due from the company and the collateral with it, though not as their own property or in derogation of the rights of the original pledgor. Nash v. Mosher, 19 Wend. 431; White v. Platt, 5 Denio, 269; Hays v. Riddle, 1 Sandf. 248; Lewis v. Mott, 36 N. Y. 395. By the assignment to Smith he acquired the rights of Mead & Clark to the extent of their advances, and was properly allowed to prove his bonds as security for that amount.

We should modify the orders of the special and general terms to correspond with these views if the facts before us would admit of so doing with absolute accuracy; but as we cannot say what bonds may or may not be produced and proved under our rulings we reverse the orders of the special and general terms and remand the case to the special term for a further hearing, costs to be adjusted below.

All concur.

Ordered accordingly.

Cf. Duncomb v. New York, Housatonic & Northern R. R. Co., 88 N. Y. 1.

Contracts between corporations having in part the same directors. Absence of actual fraud. Directors, how far in position of trustees. Void and voidable. Ratification by acquiescence of shareholders; by vote; by majority. Ignorance of facts. Presumption of knowledge.

SAN DIEGO, OLD TOWN & PACIFIC BEACH R. R. CO. v. PACIFIC BEACH CO. (L. A. 52.)

(44 Pac. 333.)

Supreme Court of California. March 24, 1896.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the San Diego, Old Town & Pacific Beach Railroad Company, a corporation, against the Pacific Beach Company, a corporation. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

McDonald & McDonald, for appellant. Gibson & Titus, for respondent.

McFARLAND, J. This is an action upon two promissory notes made by defendant to plaintiff,—one for $15,000, and the other for $1,500; the latter being for interest due upou said first-named note. Judgment went for plaintiff, from which, and from an order denying a new trial, defendant appeals.

Each of the parties is a corporation. The respondent owns and operates a railroad from a certain point in the city of San Diego to another point in said city, about 10 miles distant, known as "Pacific Beach"; and it is the only railroad running to the latter point. The appellant is a real-estate company owning a large tract of land at said Pacific Beach, and engaged in subdividing, improving, and selling said land by lots and blocks. In July, 1888, the two corporations entered into a written contract, by which respondent covenanted that, in consideration of certain sums of money to be paid it by appellant, it would operate its road between said points for two years; that, during said time, it would run at least four trains daily, at such times as appellant should direct, the appellant to have the right to change its directions; that it would charge for passenger fare not exceeding 25 cents for each round trip, and sell to residents at Pacific Beach commutation tickets for a sum not exceeding $4.50 per month; and it bound itself to appellant in the sum of $35,000, and pledged all its property as security for the obligation, to comply with all its covenants, and agreed that, in case of its failure to so comply for five days, the said sum of money should be paid to appellaut as liquidated damages. In consideration of these covenants appellant gave its three promissory notes to respondent,—one for $5,000, due in six months, one for $15,000, due in one year, and the third for $15,000, due in two years. Respondent complied with all its said covenants, and operated its road in accordance with said contract during the two years. The appellant paid the two first notes in full, and paid the interest on the third ($15,000) note up to July 10, 1891; the last installment of said interest having been paid by the $1,500 note here sued on. Afterwards appellant refused to make any further payment, and this suit is upon the second $15,000 note, and the said $1,500 given for interest, as aforesaid.

The main contention of appellant for a reversal arises out of these facts: The respondent had five directors, and the appellant nine; and at the time the contract was made four of the directors of the appellant were also directors of the respondent, and it is also claimed tnat, before the completion of the contract, a fifth director of appellant—D. C. Reed—became a director of respondent. A majority of the directors of both corporations were also stockholders in both, and the contention of appellant is that, because there were common directors of the two corporations as aforesaid, therefore the contract was absolutely void, and incapable of ratification. Respondent contends that, upon these facts, the contract was, at the most, only voidable, and that the appellant ratified it. Appellant also contends that, even though ratification were possible, there was none. In this case there is no actual fraud, either alleged or found; and this distinguishes it from many of the cases cited by appellant. The contract seems to have been a fair, open one, and carried into effect before the eyes of all persons interested. Neither is there any question of ultra vires; and this also distinguishes the case from cases cited by appellant. The court found that appellant's charter expressly gave it the power to make such a contract. See, also, on this point, Vandall v. Dock Co., 40 Cal. 83. The contention, therefore, at this point of the case, is that the mere fact that there were common directors, as above stated, of the two corporations at the time of the contract, makes it absolutely void; and this contention canuot be maintained.

Where two corporations, through their boards of directors, make a contract with each other, the directors who are common to both are not within the rigid rule of the cases which hold that one who acts in a fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void, without any examination into its fairness, or the benefits derived from it to the cestui que trust. Two corporations have the right, within the scope of their chartered powers, to deal with each other; aud this right is certainly not destroyed or paralyzed by the fact that some, or a majority, of the directors are common to both. Of course, if such directors should wrongfully and willfully use their powers to the prejudice of one of the corporations, their action, if not acquiesced in, and if contested at the proper time, could be avoided, as in any other case of actual fraud. But such common directors owe the

same fidelity to both corporations, and there is no presumption that they will deal unfairly with either. Therefore, their acts as such common directors are not void. There are abundant authorities to this proposition, but it is hardly necessary to refer to any other than that of Pauly v. Pauly, decided by this court (107 Cal. 8, 40 Pac. 29), and the cases there cited. In that case the court, in its opinion, says: "The stumbling block in this case, however, seems to have been the double relation of agency of Collins, Dare, and Harvermale, being at the same time officers and directors in both corporations," —and quotes approvingly from Mining Co. v. Senter, 26 Mich. 73, and Leavenworth Co. Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 10 Sup. Ct. 708, which cases strongly declare the rule above stated. The conclusion reached is correctly condensed in the syllabus, as follows: "The fact that some of the directors of the bank were also directors of the cable company does not prevent them from being distinct corporations, who have the right to contract with each other in their corporate capacities; and, if the relation of the parties has not been abused, it constitutes no bar to a recovery of moneys advanced by the bank and used for the benefit of the cable company." We will notice one or two other recent authorities to the same point. In Coe v. Railway Co., 52 Fed. 543, Judge Pardee says: "That the East & West Railroad Company could lawfully contract with the Cherokee Iron Works, although all the stockholders of the one were also stockholders of the other, in the absence of fraud and misrepresentation, is indisputable; nor would the fact that the two corporations had substantially the same directors, who were the active agents negotiating the contract, render it void,—at worst, only voidable, but subject to ratification." In Jesup v. Railroad Co., 43 Fed. 483, the validity of a lease between two corporations in which there were common directors was involved; and Justice Harlan held (we quote, for brevity, from the syllabus, which is correct) as follows: "The contract by which the Dubuque Company leased the Cedar Falls road would not have been void, even if the majority of the directors of that company had been personally interested in the Cedar Falls Company. It would have been simply voidable at the election of the Dubuque Company, or, in a proper case, at the suit of its stockholders; and that election must have been exercised, or the suit brought, within such time as was reasonable, taking into consideration all the facts and circumstances of the case."

In the notes to section 658, Cook, Stock, Stockh. & Corp. Law (3d Ed.), there are many cases cited on the subject. They are not all in perfect harmony, but they abundantly warrant the statement in the text that "this class of contracts certainly are not void." See, also, Booth v. Robinson, 55 Md. 419; Kitchen v. Railroad Co., 69 Mo. 224. The decisions of this court and of other courts, cited by appellant, are mostly in cases where trustees attempted to contract about the trust property directly with themselves, for their individual benefit, and not cases where corporations dealt with each other through common directors; or in cases of ultra vires in the strict sense; or in cases where actual fraud was the ground of the alleged invalidity of the contract. For instance, Graves v. Mining Co., 81 Cal. 303, 22 Pac. 665, is greatly relied on by appellant; but in that case the directors of a single corporation had undertaken to vote themselves money,—partly for salary prohibited by the by-laws,—and to execute in the name of the corporation a note and mortgage for a large amount of money to themselves as individuals. This was an entirely different state of facts from those in the case at bar. Moreover, that case was decided upon the grounds of actual fraud and a failure to prove ratification,—the court saying, "The fairness, honesty, and good faith of the transaction under consideration are further impeached by the testimony," etc.; and the court say, even in that extreme case, "It is not intended to decide, however, that these directors may not have recovered from the corporation the value of money or property honestly advanced by them, and which had been used by and for the benefit of the corporation in carrying on its business, or the value of services rendered by them outside of the duties of their office, in a proper case and upon a proper showing." It is true that the opinion there holds—no doubt, correctly—that directors of corporations are trustees within the meaning of sections 2228–2230 of the Civil Code; but those sections, so often invoked by appellant, are mere statements of the fundamental principle of the law of trusts that a trustee cannot deal with the trust property for his own individual benefit, and that principle obtained in all the jurisdictions where the decisions about common directors hereinbefore cited were rendered. It is unnecessary to notice each of the other cases cited by appellant. It is sufficient to say that each case, in some of the features above indicated, differs essentially from the case at bar.

The contract, therefore, was not void; and assuming that it was voidable, and might have been avoided by the appellant at the proper time and in the proper manner, it is clear that it was not so avoided, but that it was ratified. In the first place, there was no attempt to avoid it, nor any intimation of such intention, until long after the time mentioned in the contract had expired, and respondent had performed all its covenants therein provided, until long after appellant had received all the benefits coming to it from respondent's performance, and until long after it had become impossible to restore anything to respondent, or to put it, in whole or

in part, in statu quo. And during this time appellant without objection paid, from time to time, the greater part of the principal and a large part of the interest which by the contract it had promised to pay; thus inducing respondent to perform the whole of its part of the contract in confidence that appellant would do the same. This, we think, under the circumstances of this case, constitutes ratification by acquiescence; for the rule is that a party cannot repudiate the burdens of a contract while enjoying its benefits. Underhill v. Improvement Co., 93 Cal. 312, 28 Pac. 1049. There is some question as to the sufficiency of the findings on this point, although, in our judgment, they sufficiently state the facts constituting such acquiescence. The court, however, also found that, at three different meetings of the stockholders of appellant, at two of which over two-thirds of the stockholders were represented, and at the other over a majority, the action of the directors in making the contract in question was ratified, approved, and confirmed; and the evidence supports this finding. At the regular annual meeting on August 29, 1888, six weeks after the making of the contract, at which more than two-thirds of the stockholders were represented, all the previous acts of the board were expressly ratified. At the regular annual meeting on August 29, 1889, at which more than two-thirds were represented, the reports of the secretary and treasurer, showing the existence of the $15,000 note sued on, were read and approved, and all the proceedings of the preceding year were unanimously approved; and at a regular adjourned meeting, on September 5, 1889, at which a majority of the stock was represented, the same thing was shown by the reports of said two officers, and the action of the board again unanimously approved. It is admitted that there was also another annual meeting of the stockholders in August, 1890, at which all former actions of the directors were approved. These acts constituted a ratification of the contract in question. Underhill v. Improvement Co., 93 Cal. 313, 28 Pac. 1049.

The contention of appellant that the contract could not be ratified except by the unanimous consent of all the stockholders cannot be maintained. That principle does not apply to acts which might have been authorized by a majority in the first instance. "The corporation may, however, ratify an unauthorized transaction of its agents; and this may be done either by the unanimous acquiescence of the shareholders, or by a vote of the majority if the transaction is of such a character that the majority might have authorized it at the outset." 1 Mor. Priv. Corp. (2d Ed.) § 525, and the cases there cited. The rule is that the majority governs, and every stockholder contracts that such shall be the rule. Civ. Code, § 312; 1 Mor. Priv. Corp. § 474.

There is nothing in the contention that the ratifications were made without knowledge of what they meant. In the first place, this is not an action by individual stockholders to set aside a contract made by the corporation. The point is made by the corporation itself, in a defense in which it seeks to violate its own obligation; and it would be absurd to say that it did not know what it was doing. But, if we assume that in this action the corporation could shield itself between the ignorance of a few of its stockholders, it is clear that the latter knew, or ought to have known, the nature of the contract and the circumstances attending it. The respondent ran its railroad through the premises of appellant upon land purchased for that purpose by the former from the latter, there was a continuous operation of the road according to the contract, and a continuous payment from time to time by appellant of large sums of money under the contract, and the relations of the two corporations were of an intimate character. And, as was said in Blen v. Mining Co., 20 Cal. 613, 614: "The natural presumption is that it was fully considered, and the particulars inquired into and explained, and the idea that this was not done is certainly at variance with the usual mode of conducting business." And, again: "A ratification supposes a knowledge of the thing ratified," and "there is no evidence of any mistake in this case." Moreover, at the meeting of the stockholders at which the contract was first ratified, the minutes of the meeting of the board of directors of appellant at which the contract was made were read; and they showed that Gassen, who was a director of appellant, was also director, president, and general manager of the respondent, and presented the table of trains, and acted for the respondent. Furthermore, as was said in Underhill v. Improvement Co., supra, quoting from Morawetz: "Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents by abstaining from inquiring into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefits of their acts in case of success." It is significant that in the case at bar there was no attempt to show a want of knowledge of any of the stockholders of any circumstance connected with the contract which is now sought to be repudiated.

With respect to the discussion by appellant of the value of the consideration for which it entered into the contract, it is sufficient to say that the wisdom or good policy of that contract is not a matter for decision here. The facts found show what the consideration was. In considering this case, we have assumed, without deciding, that the contract involved was one which the appellant, if there had been no acquiescence or express ratification, might by prompt action have avoided. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

Amendments of charter. Obligation of contracts. Authority to issue preferred stock. Transfer of shares to escape assessment.

EVERHART v. WEST CHESTER & PHILADELPHIA RAILWAY CO.

(28 Pa. St. 339; Redfield's American Railway Cases, 180.)

Supreme Court of Pennsylvania. 1857.

Error to court of common pleas, Chester county.

This was an action of assumpsit brought by the West Chester and Philadelphia Railroad Company, to recover from William Everhart the amount of one hundred snares of capital stock of the company subscribed by him, together with the penalty of one per centum per month for non-payment imposed by the act of incorporation. The facts sufficiently appear in the opinion of the court. There was a judgment for plaintiff. Defendant brought error.

J. J. Lewis and M. Russell Thayer, for plaintiff in error. Pennypacker & Bell, for defendant in error.

WOODWARD, J. There are two principal questions in this case, the first whereof is whether the several acts of assembly supplemental to the acts which incorporated the company, wrought such essential and radical changes in the constitution and objects of the company as to release the defendant from the payment of the installments on the stock for which he had subscribed.

The first of these supplemental acts, passed the 7th January, 1853, authorized the stockholders to elect three additional managers.

The next, passed the 27th February, 1854, enacted that each share of stock should give the holder one vote at all elections of officers and other stock votes, provided he had held it for more than thirty days prior to such vote.

The last act, passed the 30th March, 1855, authorized the company, "for the purpose of completing and equipping their said railroad," to create a preferred stock to the extent of eight thousand shares of fifty dollars each, and for the purpose of redeeming its bonds and the preferred stock, and for the payment of other debts, to issue and dispose of bonds to any amount not exceeding six hundred thousand dollars, at a rate of interest not exceeding 8 per cent. per annum. Besides providing for many details connected with the preferred stock, the act stipulates that before it takes effect as a law of the corporation, it shall be accepted by a majority in value of the stockholders entitled to vote, and prescribes how the meeting of the stockholders shall be convened.

It was admitted on the trial that the company had accepted all the provisions of the above-named acts of assembly.

Now it is too plain for controversy that this legislation was in aid of the objects and purposes of the corporation, which were in general to build and work a railroad from the borough of West Chester to the city of Philadelphia. The company was incorporated in pursuance of an act of assembly passed in 1848—they had organized and commenced their work—and the preamble to the act of 1855 recites that they would require, to complete and equip their road, a greater sum than could be realized by the sale of bonds and stock now authorized by law, and that the making of a floating debt to meet such requirements would be onerous to the management of the road, and in all probability unduly hazard the interests of holders of its capital stock. Out of these embarrassments grew the remedial legislation that was accepted by the company, but which is now set up by one of the original corporators as a defense against his payment of stock.

The diligence of the learned counsel has failed to find a case to countenance such a defense.

Nothing is plainer than that an alteration of a charter by the legislature may be so extensive and radical as to work an entire dissolution of the contract entered into by a subscriber to the stock, as by procuring an amendment which superadds to the original undertaking an entirely new enterprise. Every individual owner of shares expects, and indeed stipulates with the other owners as a body corporate, to pay them his proportion of the expense which a majority may please to incur in the promotion of the particular objects of the corporation. By acquiring an interest in the corporation, therefore, he enters into an obligation with it in the nature of a special contract, the terms of which are limited by the specific provisions, rights, and liabilities detailed in the act of incorporation. To make a valid change in this private contract, as in any other, the assent of both parties is indispensable. The corporation on one part can assent by a vote of the majority, the individual on the other part by his own personal act. Consequently, where an assessment is sued for to advance objects essentially different, or the same objects in methods essentially different from those originally contemplated, they cannot be recovered because they are not made in conformity to the defendant's special contract with the corporation. Ang. & A. Corp. & 537; Canal Co. v. Towne, 1 N. H. 44; 3 Mass. 268; 10 Mass. 384; 7 Barb. 157; 13 Pa. St. 133; Hester v. Railroad Co., 32 Miss. 378; see 14 Leg. Int. No. 18.

Whilst these principles are unquestionable, it is equally well settled by the authorities that modifications and improvements in the charter, useful to the public, and beneficial to the company, and in accordance with what was the understanding of the subscribers as to the real object to be effected, do not impair the contract of subscription. Irvin v. Turnpike Co., 2 Pa. St. 466; Gray v. Navigation Co., 2 Watts & S. 156; Clark v. Navigation Co., 10 Watts, 364. The case of the Indiana Turnpike v. Phillips, 2 Pa. St. 184, is an instance

of such radical alteration in the structure of the company as works a release of the subscriber.

These general principles are founded in common sense, and it is apparent that they afford not the least support to this defense. The defendant voluntarily embarked in an enterprise which could only be carried out by accumulating large sums of money. His special contract with the other corporators looked to nothing less than a finished railroad from West Chester to Philadelphia; and it implied necessarily the ordinary and lawful means for accomplishing that object. When their money was expended and the work not finished, the necessary funds could be raised only by giving these funds a preference over the original stock, whether they came in the form of a loan or of preferred stock. Without the remedies provided by the legislature, the defendant's stock must remain worthless on his hands—with them, he shared a common chance with the others of realizing ultimate profits. The legislation then, without altering the structure of the company, or changing the objects of its institution, or the mode in which those objects were to be pursued, set on foot a scheme of finance intended for its relief and benefit. It was to complete and equip the road—the very road—the defendant had agreed to assist to build.

We all agree that the parts of the charge quoted in the 10th and 11th assignments of error were unexceptionable.

On the next question, which relates to the right of the defendant to transfer his stock so as to escape liability for the unpaid installments, we are a divided bench; but a majority concur, though for different reasons, in holding him liable notwithstanding the transfer he made.

Two of us think he had a perfect legal right to assign his stock on any terms he pleased, but that unless it was done with the consent of the company, he remained liable still to them as a stockholder for the unpaid portion of his subscription. One of our number is of opinion that if the assignment had been bona fide it would have relieved him from further liability, but that, the record showing that it was a transfer mala fide, he remains liable. The only remaining judge who sat in the argument holds that the assignment was valid and relieved the defendant from further liability.

As neither of these opinions has the sanction of a majority, they are not to be discussed, and are indicated only to show that they result in an affirmance of the ruling below on this point.

These are the principal questions in this case; but there are some minor points that require a passing notice.

It is not quite clear from the record that the court gave any instruction on the subject of the rate of interest to be charged against the defendant; but if the 12 per cent. provided for in the 8th section of the incorporating act were allowed in pursuance of what the court said as quoted in the 9th assignment of error, a majority of our number think it was right, so that the defendant takes nothing by that assignment.

The defendant had estopped himself from denying that five dollars a share was paid at the time of subscribing.

And there are no grounds for the objections to the amended declaration.

On the whole, we see no error in the record, and therefore the judgment is affirmed.

LEWIS, C. J. I think that the plaintiff in error is liable on his written "promise to pay to the corporation the sum of $50 for every share of stock set opposite his name." The subsequent transfer of his stock did not release him from that contract. It is very clear that the transfer was not made in the ordinary course, as a business transaction, because the alleged purchaser was really paid for taking the stock, instead of paying money for it. Yet that is immaterial, because, whether the transfer was fair or fraudulent—whether with the consent of the company or without it—whether entered on the books or not—whether the purchaser became liable for the installments unpaid or not, there is nothing in the law, or in the nature of the transaction, which discharges the original subscriber from his express written engagement to pay the money. Trevor v. Perkins, 5 Whart. 244. The case of Huddersfield Canal Co. v. Buckley, 7 Term R. 36, was decided on peculiar circumstances, and does not rule a case like the present.

But the penalty of one per cent. per month is imposed only on stockholders. The plaintiff in error was no stockholder when the default occurred. He is therefore not liable for the penalty. It is true that there is no assignment which brings this error to our notice in such a way as to oblige us to take notice of it. But the declaration claims the "one per cent. per month," and the amount of the verdict shows that it was recovered.

I would, therefore, direct the prothonotary to make the proper calculation of the amount of principal and interest due on the subscription, and if the plaintiff below refused to release the excess, I would reverse this judgment. This court have a right, of their own motion, to do justice. I am in favor of doing it in this case. If my brethren do not concur in this suggestion, I must unite with them in saying that the errors have not been sustained, and that the judgment must be affirmed.

Cf., as to transfers to avoid liability, Whitney v. Butler (1886) 118 U. S. 655, 7 Sup. Ct. 61.

Mandamus procedure. Municipalities cannot be compelled to aid railroads. Railroads, how far public corporations.

PEOPLE v. BATCHELLOR.

(53 N. Y. 128.)

Court of Appeals of New York. June 10, 1873.

Application for a writ of mandamus to compel the issuance of bonds in aid of a railroad company. An alternative writ was issued, and, upon a trial of the issues raised by the return, there was a verdict and judgment for relator. Defendant appealed. Reversed.

John Ganson, for appellant. E. C. Sprague, for respondent.

GROVER, J. Section 1, c. 672, Laws 1867, enacts that it shall be lawful for the supervisor of any town in the county of Chautauqua, through which the Dunkirk, etc., Railroad shall run, or of any town adjoining either of the towns through which said railroad shall run, to borrow, on the faith or credit of such town, any sum of money not exceeding twenty per cent of the assessed valuation of the real and personal property of such town, as shown by the last assessment-roll previous to the issuing of the bonds authorized by the act, at a rate of interest not exceeding seven per cent, and for a period not exceeding thirty years, and to execute bonds therefor; provided that the power and authority conferred shall only be exercised upon the condition that the consent shall first be obtained in writing of a majority of the tax payers of such town owning or representing, etc., more than one-half of the taxable property of said town, assessed and appearing upon the assessment-roll of the year last preceding the issuing of the bonds authorized, proved or acknowledged as therein specified; and that such consent shall be procured within three years from the passage of the act. That such consent shall state the amount of money to be raised, and the fact that a majority of the tax payers owning or representing a majority of the taxable property, as appeared from the assessment-roll, had been obtained, should be proved by the affidavit of one of the assessors of the town, or that of the town or county clerk, indorsed upon or annexed to such written consent, which should be filed, and have the effect specified in said section.

Section 2 provides that said supervisor may in his discretion dispose of such bonds or any part thereof to such persons and upon such terms, not less than par, as he may deem most advantageous to the town; and that the money raised by loan or sale of the bonds shall be invested in the stock of the railroad company; and that the same shall be used in the construction of the railroad, etc.; the public necessity and utility of which was thereby declared; and that in its construction the said towns were immediately interested; and that for the purpose of such construction the said supervisor, in the name of the town, might subscribe for and purchase the stock of said company, to the amount to which the tax payers had consented, as above specified; and that by virtue of such subscription and purchase the town should acquire all the rights and privileges, and incur all the responsibilities as other stockholders of the company. Other sections provide for levying and collecting taxes for the payment of the interest and principal of the bonds to be issued, and other matters not material to the questions in this case.

Between the passage of the above act and before the passage of chapter 472, p. 850, 1 Laws 1868, the town of Stockton was not bonded. By the first section of the last-mentioned act it was provided that in case the written consent of the tax payers of any town had been or should thereafter be obtained in the manner provided by the first-mentioned act, its supervisor was authorized and required to make a subscription to the stock of the company to the amount fixed in such consent, and to issue the bonds of the town, and dispose of the same as required by said first-mentioned act. Section 3 of the last act provides that the supervisor of Stockton shall not be required to issue the bonds of that town, although authorized as required by the act of 1867, until the iron was laid upon the road from Dunkirk to the Pennsylvania line.

The following consent of tax payers was introduced in evidence upon the trial: "The undersigned, tax payers of the town of Stockton, hereby consent that the supervisor of the town of Stockton may borrow the sum of $34,000 on the faith and credit of said town, at a rate of interest not exceeding seven per cent, for a term not exceeding thirty years, and execute bonds therefor under his hand and seal; and that the said supervisor may, in his discretion, dispose of such bonds or any part thereof; and that the proceeds of the sale of such bonds shall be invested in the stock of the Dunkirk, etc., Railroad Company; and that the said supervisor may exercise full and complete powers for said town under the first-mentioned act." This consent was signed by a considerable number of tax payers, whose signatures were proved or acknowledged as required by the act, to which was annexed an affidavit of Corydon Putnam, one of the assessors of the town, to the effect "that the persons whose names appear attached to said consent, and which appear on the assessment-roll of the town for the year 1867, were a majority of all the taxpayers of the town of Stockton whose names appear upon said assessment-roll, and that they are a majority of all the tax payers in said town of Stockton whose names appear upon the assessment-roll for the year 1867, including resident tax payers, owners of non-resident lands, and including agents representing owners of taxable property; and that each person so signing said

consent has in due form acknowledged the same, or his signature been proved in due form of law." This affidavit was sworn to November 21, 1867; but the papers were not filed in the town clerk's office until April 25, 1868.

No further steps to bond the town appear to have been taken until after the passage of chapter 282, p. 634, 1 Laws 1870. Section 2 of this act provides that in any case where the written consent, authorizing the supervisor of any town to subscribe to the stock of the Dunkirk, etc., Railroad Company, shall have been filed in the town clerk's office of the town, and a copy thereof in the county clerk's office of the county, with the affidavit of one of the assessors of the town, etc., indorsed or annexed to such written consent, and such affidavit shall be based upon the assessment-roll of such towns for either of the years 1867, 1868, or 1869, or for the last year previous to the issuing of the bonds as authorized, such affidavit shall be evidence in all courts and for all purposes, and such consent shall authorize, uphold and require the respective subscriptions to be made to such stock, and authorize, uphold and require the issue of bonds to the amount specified in such consent for such towns respectively, and such bonds shall bear date and interest from the respective dates of the first filing of said copy of consent and affidavit in the Chautauqua county clerk's office, and no clerical or other defects in any of such affidavits shall invalidate such proof, or the subscription to the stock or the said bonds. Section 3 provides that if the said bonds when issued shall not be sold for money, as required by the original act, within thirty days from the time when they are ready for sale, the supervisor of the town issuing the same shall deliver said bonds to the railroad company, receiving therefor the par value of the principal of said bonds in the stock of the company at its par value. Section 4 repeals section 3 of the act of 1868, which provided that the supervisor of Stockton should not be required to issue the bonds of the town until the iron was laid on the road from Dunkirk to the Pennsylvania line. The act of 1867 was a mere enabling act, conferring power upon the several towns embraced therein to issue bonds, upon the conditions therein specified, to aid the construction of the railroad, etc. It conferred no right upon the railroad company or any one else, when proceedings for bonding had been commenced, to have any further steps taken until bonds had been actually issued under the act. Then such rights were acquired. The railroad company could then enforce the application of the proceeds to the construction of its road according to its provisions, assuming the act to be constitutional. The consent of the tax payers was given under this act. The entire language of the consent shows that the signers understood the act, and their consent in conferring discretionary power upon the supervisor to act upon his views as to the interest of the town. They consent that he may borrow the sum of $34,000, upon the faith and credit of the town, etc., and execute bonds therefor. That he may, in his discretion, dispose of such bonds or any part thereof, and invest the proceeds in the stock of the railroad company, and that he may exercise full and complete powers for said town, under the act. Sometimes the word "may" is construed as "shall," but only when the context shows that such was the intention, or when the public have an interest in the exercise of the powers so conferred upon officers or official boards or tribunals. The import of the word, as used in the consent and the act, is to give power, license and permission, not to require or enforce the performance of any one of the specified acts. This view is confirmed by the different language of the acts of 1868 and 1870, relating to the same subject, the latter showing an intention to compel the supervisor to bond the town, and if he failed to sell the bonds at par, within thirty days after they were ready for sale, he is not only authorized but required to deliver the bonds to the railroad company, upon receipt from it of an amount of stock equal to the principal of such bonds. Under the act of 1867, care was taken that the bonds should not be issued for less than the par value, in cash. This would be the result, whether the money was borrowed upon the faith and credit of the town, and the bonds given as security, or the bonds sold at not less than par. Thus there would, in case the town was bonded, be secured for the construction of the road, cash equal to the principal of the bonds. If the bonds are delivered to the company upon the receipt of stock, to an amount equal to the principal of the bonds pursuant to the act of 1870, the bonds become the property of the railroad company, and may be sold upon the market much below par, and thus much less money accrue therefrom from the construction of the road. It is obvious that the consent given does not embrace any such transaction.

Again, the act of 1867 requires that the consent shall be based upon the assessment-roll of the year last previous to the issuing of the bonds. This is entirely departed from in the act of 1870. Had there been no subsequent legislation it is clear that no bonds could have been issued upon the consent given and affidavit made after the completion of the roll of 1868. Had bonds been issued under the provisions of the act of 1867, and the town had complied with its provisions, it would not have been liable to pay a tax at any one time to pay more than one year's interest upon the bonds, as none would have accrued prior to the issue; while the act of 1870 requires in effect that they should bear date and be upon interest from April 25, 1868, the time of filing the consent and affidavit in the town clerk's office,

thus subjecting the town to a tax for this back interest in addition to such as should accrue after the issue. No tax payer of the town has ever consented to any such issue of its bonds. The judgment awards a mandamus to the appellant compelling him to issue bonds according to the requirements of the act of 1870. If the consent of the tax payers or any part of them, or of any of the town boards or officers, or any of the electors of the town is necessary, this judgment cannot be sustained, as no such consent has been given to such an issue of bonds as the judgment commands.

But before examining this question it may be well to consider the point made by the counsel for the respondent, that the appellant having made a return to the alternative writ, and issue having been taken upon such return by the relator, and a verdict having been found in his favor, he is entitled to judgment thereon awarding a peremptory mandamus, together with damages and costs of course, and therefore the question whether any of the acts in question are constitutional cannot be raised by the appellant either in this or the supreme court. 2 Rev. St. p. 587, § 57, cited by counsel, provides that in case a verdict shall be found for the person suing out such writ, or if judgment be given for him upon demurrer or by default, he shall recover damages and costs in like manner as he might have done in an action on the case as aforesaid, and a peremptory mandamus shall be granted to him without delay. The common law providing and regulating the remedy by mandamus, will show that the purpose of enacting this and other provisions of this statute, and that of 9 Anne, c. 20, was to authorize such pleadings in the proceeding as would present to the court the real merits for adjudication, instead of compelling the relator to resort to an action on the case for the recovery of damages, and to obtain a peremptory writ in case of a false return to the alternative writ. A review of the common law and the reasons for the passage of the statute will be found in the opinion of Marvin, J., in People v. Supervisors of Richmond Co., 28 N. Y. 112. This shows that it was the intention of the statute to do complete justice in the proceeding itself without a resort to any other. People v. Board of Metropolitan Police, 26 N. Y. 316, was decided upon a point not affecting the present question, and while the opinion of Wright, J., seems to sustain the position of the counsel, he does not place his judgment upon that ground. It could not have been intended by the statute to give a peremptory writ where the record showed no legal right because of a mistake in the return in matters of fact resulting in a verdict for the relator. Commercial Bank of Albany v. Canal Com'rs, 10 Wend. 25, gives the true rule: "That at any time after a return, and before a peremptory mandamus is awarded, the defendant may object to a want of sufficient title in the relator to the relief sought or show any other defect of substance, though he cannot after return object to defects in form." If the law gave an absolute right to the writ where a verdict was found for the relator, although from the entire record it appeared he had no such right, great injustice might be the result.

This brings us to the question whether a mandatory statute compelling a town or other municipal corporation to become a stockholder in a railroad or other corporation by exchanging its bonds for stock upon the terms prescribed by the statute, without its consent in any way given, is constitutional. This is a different question from that decided by this court in Bank of Rome v. Village of Rome, 18 N. Y. 38, and in subsequent cases. In these the question was, whether enabling statutes conferring power upon such corporations to contract debts with their own consent and investing the money thus raised in the stock of railroad corporations or of exchanging directly its bonds for such stock were valid. These acts were held constitutional by this court, but this does not determine that municipal corporations may be compelled by the mere authority of the legislature to enter into this class of contracts and become such stockholders without their consent and against their will. In People v. Flagg, 46 N. Y. 401, it was held that an act requiring the town of Yonkers without its consent to issue bonds for raising money, which was to be expended in the construction of highways in the town, in the manner prescribed by the act, was constitutional. This was so determined, upon the ground that the making and improving of public highways and providing the means therefor were appropriate subjects of legislation; that towns possess such powers as are conferred by the legislature; that they are a part of the machinery of the state government and perform important municipal functions, subject to the regulation and control of the legislature. In short, that the act was the mere exercise of the unquestioned power of the legislature to determine what highways should be constructed, and of the taxing power in providing means to defray the expense incurred in their construction. But it is said in the opinion that if the object of the expenditure was private, or if the money to be raised was directed to be paid to a private corporation, which is authorized to use the improvement for private gain, the question would be quite different, and in this respect there is a limit beyond which legislative power cannot legitimately be exercised. It is manifest that the question presented in the present case was not determined in that, unless it shall be further held that a railroad owned and controlled by a corporation and operated by it for the benefit of its stockholders is a public highway in the same sense as the common roads of the country. The towns through which the latter run may be compelled to

construct and keep them in repair for the common use of the public. The substantial question in the present case is, whether they may be so compelled to construct and repair railroads owned and operated by corporations for the benefit of the stockholders. It is clear that they may be, if they are public highways in the same sense as common roads. It has been uniformly held that the right of eminent domain may be exercised so far in behalf of a railroad corporation as is necessary for the construction and operation of the road upon the ground that the road and its operation was for a public purpose, and therefore the real estate condemned for its use was taken for public and not private use. But it is equally clear that property acquired by the corporation belongs to it exclusively, and its ownership is as absolute as that of any private individual or property belonging to him. It is also clear that so far as the road is operated for the benefit of its stockholders the corporation is private. We have then an artificial being, created by the legislature, endowed with public franchises, the absolute owner of property of which it cannot be deprived by legislation except for public purposes, carrying on business for the private emolument of its stockholders. People v. Flagg determines that towns may be compelled to provide for the construction and maintenance of improvements of a public character exclusively. But here we have an attempt to compel them to aid in the construction of a work public in some respects, but private in others, of at least equal importance. It is said that municipal corporations are creatures of the legislature and subject to its control. In a certain sense this is true. They are created by the legislature as instrumentalities of the government, and so far as legislation for governmental purposes is concerned, are absolutely subject to its control. The powers of legislation over individuals is given to the legislature for all the purposes of government, subject to such restrictions as are contained in the constitution. Yet no one would claim that an individual could be compelled by a statute to exchange his note or bond and mortgage with a railroad corporation for its stock against his will upon such terms as were prescribed in the act or any other. It is within the province of legislation to provide for enforcing the performance of contracts when made; but to enforce the making of them by individuals is entirely beyond it. We have seen that municipal corporations may be compelled to enter into contracts for an exclusive public purpose; but I think they cannot be when the purpose is private. This is equally beyond the province of legislation in the case of such corporations as in those of private corporations or individuals. In Atkins v. Town of Randolph, 31 Vt. 226, it was held that an act providing for the appointment of an agent of the town by the county commissioner, with power to purchase liquors on the credit of the town, and to sell the same for certain specified purposes, and account for and pay over the proceeds to the town as prescribed, was unconstitutional; and the town, not having consented to the appointment or ratified the contract, was not liable for the liquors purchased upon its credit by such agent pursuant to the act. This judgment is based upon the grounds that the legislative power over municipal corporations is not supreme, and does not include the power of compelling them to enter into contracts of a private character, although such contracts would conduce to the public good by enabling the government to suppress traffic in intoxicating liquors. In Western Sav. Fund Soc. of Philadelphia v. City of Philadelphia, 31 Pa. St. 185, it was held that when a municipal corporation engages in things not public in their nature, it acts as a private individual; and in the same case, between the same parties (Id. 175), it was held that it so acted in supplying its inhabitants with gas. In Bailey v. Mayor, etc., 3 Hill, 531, it was held that a municipal corporation was to be regarded as private to its ownership of lands and other property; and that the test whether powers exercised by a municipal corporation were public or private was whether they were for the benefit and emolument of the corporation or for public purposes; and it was further held that the city of New York, under the act to supply the city with pure and wholesome water (Laws 1834, p. 451), acted as a private corporation, and was responsible as such for the acts of those appointed by the act, for the reason that the corporation had accepted of and consented to the act. Surely a town acts as a private corporation in becoming a stockholder of a railroad corporation, and as such interested in the operation of the road for the benefit of the stockholders. When a municipal acts as a private corporation it acts as an individual. In Taylor v. Porter, 4 Hill, 140, it was tersely said by Bronson, J., that the power of making bargains for individuals has not been conferred upon any department of the government. In People v. Morris, 13 Wend. 325, the distinction between the nature of the action of public and private corporations is clearly given.

Olcott v. Board of Sup'rs, 16 Wall. 678, recently decided in the supreme court of the United States, is cited as decisive of the question now under consideration in the present case. But this question was not in that case. That action was for the recovery of notes and orders issued by the county to the Sheboygan and Fond du Lac Railroad Company, in pursuance of an enabling act passed by the legislature, which required such issue to be approved by a majority of the votes given at an election to be held for the purpose of determining whether such majority approved of such issue. The question was whether the enabling act was con-

stitutional. The circuit court held it was not, and gave judgment for the defendant upon the ground that the supreme court of Wisconsin had previously so determined, and that as the question was whether an act of the state legislature was authorized by the constitution of the state, the federal courts must adopt the determination of the state courts. This judgment was reversed by the supreme court, the chief justice and Justices Davis and Miller dissenting. Upon the question involved the supreme court has no appellate jurisdiction from judgments of the state courts; and hence its judgment is not controlling in the determination. I concur in the views of the dissenting justices, that when the federal courts acquire jurisdiction by reason of the residence of the parties, they ought, in such questions, to follow the determination of the courts of the state. Justice Strong, in the prevailing opinion, holds that the taxing power can be exercised for public purposes only; but insists that the construction of railroads falls within this class, and that the taxing power may be resorted to therefor. But the exercise of the taxing power, either general or local, for this purpose is altogether different from compelling a town to take stock in the corporation without its consent, and to that extent engage in the business of a common carrier. I think it would not be claimed that a town could be compelled to become a stockholder in a banking or manufacturing corporation, although it appeared that the particular corporation would largely promote the public interest where the business was conducted. Such legislation could only be sustained by holding the power of the legislature supreme over municipal corporations for private as well as public purposes. Upon principle and authority I think it is not as to the former, although it is as to the latter. The test is, whether the purpose to be effected is public or private; if the former, a mandatory statute is valid. If the latter, it is not within the province of legislation, and consequently not within the power of the legislature, and the act is therefore void. We have seen that a railroad corporation possesses some of the characteristics of both; public as to its franchises; private as to the ownership of its property and its relations to its stockholders. Were it exclusively public the act of 1870 would be valid, but void if exclusively private. It follows that as the legislature is supreme only as to public purposes, and as the act in question relates in part to private, that to this extent it is void; and as the latter is inseparably connected with the former, the entire act must be held void. In Sweet v. Hulbert, 51 Barb. 312, it was held that an enabling act to issue bonds and donate the same or the proceeds to a railroad corporation to aid in the construction of its road was void. It is unnecessary to go as far in the present case. It is argued that the power of taxation for any purpose is supreme, and such power may be exercised upon the state at large, or any particular locality, in the discretion of the legislature; and that the act in question is but the mere exercise of this power of taxation, and therefore valid. People v. Mayor, etc., of Brooklyn, 4 N. Y. 419, and Town of Guilford v. Board of Sup'rs of Chenango Co., 13 N. Y. 143, are relied upon to sustain the position. These cases do not go quite as far as claimed by the counsel. The former only determines that an act providing for the expenses incurred in grading and improving the streets of a city by assessments upon the property benefited is a legitimate exercise of the taxing power, and therefore valid; and the latter that the legislature can recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude and charity, and provide for their payment by imposing a tax upon those who ought to pay them. The act in question cannot be maintained upon the taxing power. A municipal corporation cannot be compelled to embark in a business of a private character, because its prosecution by it will probably or certainly lead to its taxation for the capital to be invested or expenses incurred therein. The above view renders an examination of the other questions discussed unnecessary.

The judgment appealed from must be reversed and a judgment rendered declaring the relator not entitled to a peremptory writ and dismissing the proceedings, with costs to the appellant.

CHURCH, C. J., and ALLEN and PECKHAM, JJ., concur. FOLGER, J., concurs in result. ANDREWS, J., dissents. RAPALLO, J., does not vote.

Estoppel by recitals in county bonds. Assent of two-thirds of qualified voters. Lis pendens. Effect of injunction against unauthorized issue, on purchaser without notice. Effect of State decisions, as to construction of State statute, on federal courts.

CARROLL COUNTY v. SMITH.

(111 U. S. 556, 4 Sup. Ct. 539.)

Supreme Court of the United States. May 5, 1884.

Error to the District Court of the United States for the Northern District of Mississippi.

J. G. George, for plaintiff in error. L. B. Valliant and Geo. B. Howry, for defendant in error.

MATTHEWS, J. This was an action at law brought to recover the amount of certain overdue interest coupons, upon municipal bonds, alleged to be obligations of the plaintiff in error, delivered and payable to the Greenville, Columbus & Birmingham Railroad Company or bearer, for $1,000 each. Each bond contains the following recital: "The above-mentioned sum being a part of a subscription to the capital stock of the Greenville, Columbus & Birmingham Railroad Company, authorized by the following styled acts of the state of Mississippi, viz.: An act entitled 'An act to incorporate the Arkansas City & Grenada Railroad Company,' approved March 5, A. D. 1872, and an act entitled 'An act to amend an act entitled an act to incorporate the Arkansas City & Grenada Railroad Company, approved March 5, 1872,' approved March 4, A. D. 1873."

The act first referred to contained the following: "Sec. 19. Be it further enacted, that upon application by the president or other authorized agent of said corporation to the constituted authorities of any county, city, or incorporated town in the state of Mississippi, or adjacent to the main line and branch railroad of this corporation, for a subscription to a specified amount of the capital stock of said corporation, said constituted authorities are hereby required, without delay, to submit the question of 'subscription' or 'no subscription' to the decision of the qualified voters of said county, city, or incorporated town, at a special or regular election to be held therein, and if two-thirds of said qualified voters be in favor of said subscription, the constituted authorities of said counties, cities, or incorporated towns are hereby required, without delay, and are authorized and required to subscribe to the capital stock of said corporation to the amount agreed upon; and bonds of the county, city, or incorporated town making the subscription, having such time to run and such rates of interest as may be agreed upon, shall be issued, without delay, by the authorities of the counties, cities, or incorporated towns, to the president and directors of said corporation, to the amount of said subscription to the capital stock. * * *"

The second act recited had the effect merely to change the name of the company to that of "The Greenville, Columbus & Birmingham Railroad Company."

The complaint alleged that the bonds and coupons described were delivered by the county of Carroll to the railroad company, for value, and that the plaintiff became a purchaser thereof for a valuable consideration before maturity, and was an innocent holder thereof without notice.

The defendant pleaded three pleas, of which the first in order is as follows: "And for further plea in this behalf said defendant, by attorney, says actio non, because it says that on the third day of March, 1873, on the application of the president of the Greenville, Columbus & Birmingham Railroad Company, a corporation in this state, the board of supervisors of the county of Carroll ordered a special election to be held in said county on the first day of April, 1873, at which the question of subscription or no subscription, by said county, to the capital stock of said railroad company was to be submitted to the qualified voters of said county. And said defendant avers that said election was accordingly held, and said defendant avers that on the first day of April, 1873, the names of 3,129 registered voters were on the registration books of said county, and there were in fact on the first day of April, 1873, three thousand one hundred and twenty-nine qualified voters in said county, but that only 1,280 of said voters voted at said election, of whom 918 voted in favor of the proposition to subscribe for said stock and 362 voted against it, as fully appears by the returns of the three registrars of said county, filed with the clerk of said board of supervisors of said county. And said defendant says that, notwithstanding the refusal of two-thirds of the qualified voters of said county to vote in favor of subscription for stock, the then board of supervisors of said county, in violation of their duty and the trusts reposed in them, and in violation of the constitution of the state of Mississippi, subscribed to the capital stock of said railroad company, and issued the bonds and coupons in the declaration mentioned in fact, for said subscription for said capital stock in said railroad company, without any statement or recital in said bonds that two-thirds of the qualified voters of said county had assented thereto. And this the said defendant is ready to verify. Wherefore it prays judgment," etc.

The second was like the first, with the additional averments that the said returns of the registrars of the county, filed and deposited with the clerk of the said board of supervisors of said county, was "at all times open to the inspection of all persons in the public office of the clerk of the chancery

court of said county; and said defendant avers that the said registration of voters of said county was a book of record, deposited and kept in the public office of the clerk of the chancery court of said county as a record book, and open for inspection to all persons, and exhibited the fact that there were 3,129 registered voters in said county at the time of the election."

The third plea was like the second, with the addition of the following: "And said defendant avers that before the issuance of any of the bonds and coupons in the declaration mentioned, a bill was exhibited by citizens and tax-payers of said county against the said board of supervisors in the chancery court of the county of Carroll to restrain and enjoin said board of supervisors from the issuance and delivery of the bonds of said county upon a subscription of stock in said railroad company; and thereupon an injunction was ordered and issued, before the issuance and delivery of any of the bonds and coupons mentioned in the declaration, restraining and enjoining the said board of supervisors from the issuance and delivery of such bonds. And said defendant avers that the said bill of injunction was sustained and made perpetual by the judgment and decree of the supreme court of the state of Mississippi. And said defendant says that, notwithstanding the issuance and pendency of said injunction, and notwithstanding the refusal of two-thirds of the qualified voters of said county to vote for said subscription for stock in said railroad company, the said board of supervisors fraudulently and illegally issued and delivered the bonds and coupons in the declaration mentioned, in fact for a subscription for stock in said railroad company. And this the said defendant is ready to verify. Wherefore it prays judgment."

A demurrer to each of these pleas was sustained, and judgment rendered for the plaintiff below, to reverse which this writ of error is prosecuted.

The provision in the charter of the railroad company, authorizing the issue of bonds in payment of subscriptions by municipal bodies to its capital stock, is based upon article 12, § 14, of the constitution of the state, which declares that "the legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election or regular election to be held therein, shall assent thereto."

It is claimed, on behalf of the plaintiff in error, that the qualified voters referred to in the constitution of Mississippi and the charter of the railroad company are those who have been determined by the registrars to have the requisite qualifications of electors, and who have been enrolled by them as such, and that it requires a vote of two-thirds of the whole number enrolled as qualified to vote, and not merely two-thirds of such actually voting at an election for that purpose, to authorize the issue of such bonds as those in suit. That presents the single question for our decision, for the averment in the last plea, that "the board of supervisors fraudulently and illegally issued and delivered the bonds and coupons," has reference merely to their being issued without the alleged requisite assent of two-thirds of the registered voters, and there is nothing alleged in the plea from which it can be inferred that the injunction bill, pending which the bonds, it is charged, were issued and delivered, was based on any other infirmity. We do not think the plaintiff in error is precluded from raising this question by any recitals in the bonds. They contain no statement of any election called or held, or of the vote by which the issue of the bonds was authorized. They do not embody even a general statement that the bonds were issued in pursuance of the statutes referred to. The utmost effect that can be given to them is that of a statement that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place. They say nothing whatever as to any compliance with the requirements of the statute in respect to which the board of supervisors were authorized and appointed to determine and certify. They do not, therefore, within the rule of decision acted on by this court, constitute an estoppel, which prevents inquiry into the alleged invalidity of the bonds. Northern Bank of Toledo v. Porter Tp., 110 U. S. 608, 4 Sup. Ct. 254; County of Dixon v. Field, 4 Sup. Ct. 315; School-Dist. v. Stone, 106 U. S. 183, 1 Sup. Ct. 84. On the other hand, we do not agree with the counsel for the plaintiff in error that the pendency of the injunction bill, referred to in the last plea, affects the title of the defendant in error, as a bona fide holder of the bonds for value; or that this court is bound to follow and apply the judgment of the supreme court of Mississippi in that case, reported as Hawkins v. Carroll Co., 50 Miss. 735, perpetuating the injunction, on the ground that the constitution and laws of the state required a majority of two-thirds of those qualified to vote to be cast at the election, to support the validity of the bonds. The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality, by virtue of the doctrine of lis pendens. County of Warren v. Marcy, 97 U. S. 96. It is not alleged in the plea that the defendant in error had actual notice of the litigation, or of the grounds

on which it proceeded, or that any injunction was served upon the board of supervisors; and, if he had, that notice would have been merely of the question of law, of which, as we have seen, he is bound to take notice, at all events, and which is now for adjudication in this case. There is nothing in the case of Williams v. Cammack, 27 Miss. 209, 224, to which we are referred by counsel on this point, inconsistent with these views.

The decision in Hawkins v. Carroll Co., supra, is not a judgment of the supreme court of Mississippi, construing the constitution and laws of the state, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the constitution of the United States, to the independent judgment of those courts to determine for themselves what is the law of the state by which his rights are fixed and governed. It was to that very end that the constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal. Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10.

We have, however, considered the reasoning of the supreme court of Mississippi, in its opinion in the case of Hawkins v. Carroll Co., with the respect which is due to the highest judicial tribunal of a state speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fullness of its examination of the question, we are not able to adopt its conclusions. On the contrary, we are constrained to follow the decision in St. Joseph Tp. v. Rogers, 16 Wall. 664, and adhere to the views expressed by this court in County of Cass v. Johnston, 95 U. S. 360, in deciding the same question upon the construction of a provision of the constitution of Missouri which is identical with that of the constitution of Mississippi under consideration. It was there declared and decided that "all qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed." In Missouri, as in Mississippi, there was a constitutional provision requiring a registration of all qualified voters. State v. Sutterfield, 54 Mo. 391.

Much stress in the argument was laid by the supreme court of Mississippi upon the registration record, as furnishing the standard by which to ascertain the proportion of qualified voters whose assent was required by the constitution. On this point they say, (50 Miss. 761:) "There exists, therefore, in each county a registration of the list of voters, which ought to show, with approximate accuracy, the names of those entitled to vote 'at any election.' In ascertaining, therefore, the result of an election requiring two-thirds of the qualified voters of the county to assent thereto, we think that the registration books are competent evidence on the point of the number of qualified voters in the county. It would be open to proof to show deaths, removals, subsequently incurred disqualifications, etc. When the constitution uses the term 'qualified electors,' it means those who have been determined by the registrars as having the requisite qualifications by enrolling their names, etc. It would be a fair construction of the fourteenth section to hold that the 'two-thirds' meant that number of the whole number whose names had been enrolled as legal voters. That furnished official evidence of those prima facie entitled to vote. But, in this case, in addition to the information contained in the registration books, it is admitted that there were from 2,000 to 2,500 qualified voters in Carroll county at the date of this election. The proposition submitted did not have the assent of two-thirds as required by the constitution. The difficulty of proving the number of voters in the county has been obviated by this admission."

But this reasoning, as it seems to us, does not meet, much less overcome, the difficulty of the argument. The constitution of Mississippi, although it does not recognize any voters as qualified, except such as are registered, does not make all persons, registered as such, qualified. And yet, if it is to be construed, in the clause in question, as referring to the registration as conclusive of the number of qualified voters, then no proof is competent to purge the list of those who never were qualified, or have died, removed, or become otherwise disqualified, thus obliterating the distinction between registered and qualified voters; and if, on the other hand, it is to be construed as meaning voters qualified, in fact and in law, without reference to the sole circumstance of registration, then the body of electors is as indefinite as though there were no registration, and the determination of the whole number, if an actual enumeration is required to determine how many are two-thirds thereof, is completely a matter in pais, and must be inquired of and ascertained, in each case, by witnesses. The

difficulty, if not the impossibility, of reaching results by such methods, amounts almost to demonstration that such could not have been the legislative intent, or the meaning of the constitution. The number and qualification of voters at such an election is determinable by its result, as canvassed, ascertained, and declared by the officers appointed to that duty, or as subsequently corrected by a contest or scrutiny in a direct proceeding, authorized and instituted for that purpose; it cannot be contested in any collateral proceeding, either by inquiry as to the truth of the return, or by proof of votes not cast, to be counted as cast against the proposition, unless the law clearly so requires. In our opinion, the constitution of Mississippi did not mean, in the clause under consideration, to introduce any new rule. The assent of two-thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two-thirds of the qualified voters present and voting at such election in its favor, as determined by the official return of the result. The words "qualified voters," as used in the constitution, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote.

We are, consequently, of opinion that there is no error in the judgment of the circuit court, and it is accordingly affirmed.

Cf. Oregon v. Jennings (1886) 119 U. S. 74, 7 Sup. Ct. 124; Pleasant Township v. Aetna Life Ins. Co. (1891) 138 U. S. 67, 11 Sup. Ct. 215.

Preferred stock. Relation of stockholders to creditors.

WARREN et al. v. KING et al.

(108 U. S. 389, 2 Sup. Ct. 789.)

Supreme Court of the United States. May 7, 1883.

Appeal from the circuit court of the United States for the district of Indiana.

G. P. Lowrey, for appellants. E. M. Johnson, Benj. Harrison, and W. H. Peckham, for appellees.

BLATCHFORD, J. In November, 1876, William King and others, holders of second-mortgage bonds and of Springfield Division bonds of the Ohio & Mississippi Railway Company, filed a bill in the circuit court of the United States for the district of Indiana, to foreclose two mortgages on the property of the company, subject to a first mortgage. In August, 1877, Allan Campbell, a defendant in that suit and trustee of one of the two mortgages, called the second mortgage, and also of the first mortgage, filed a bill and a cross-bill in the same court to foreclose those two mortgages. In January, 1879, the two suits were consolidated. In December, 1879, George Henry Warren and others, as owners of preferred stock of the company, having been made parties defendant to the consolidated suit, filed a cross-bill. To this cross-bill a general demurrer for want of equity was interposed. The court sustained the demurrer, and entered a decree dismissing the cross-bill for want of equity. King v. Railroad Co., 2 Fed. 36. From this decree the plaintiffs in that bill have appealed to this court.

The sole question involved is whether the preferred stockholders are entitled to have their shares of stock declared to be a lien on the property of the company next after the first mortgage. As the question arises on demurrer, the allegations of the cross-bill are to be taken as true. The Ohio & Mississippi Railroad Company, having been incorporated by Indiana in February, 1848, was incorporated by Ohio in March, 1849, and by Illinois in February, 1851. Under a second mortgage made by it in January, 1854, all the property and franchises of the Illinois company were sold, on a foreclosure of that mortgage, in June, 1862, to the Ohio & Mississippi Railroad Company, an Illinois corporation created in February, 1861, for the purpose of purchasing the property and franchises of the Illinois corporation of February, 1851. The property and franchises of the Indiana and Ohio corporations were sold, under judicial decrees, in January, 1867, subject to certain mortgage debt recited in the decrees, to Allan Campbell and others, "trustees of creditors and stockholders of said Ohio & Mississippi Railroad Company, (Eastern Division.)" This trust was created by an instrument in writing, dated December 15, 1858, and known as the "trust agreement of creditors and stockholders of the Ohio & Mississippi Railroad Company of Indiana and Ohio." By it Allan Campbell and others were created trustees, for the purpose of providing for and protecting claims of judgment creditors and other persons holding liens on the property and franchises of the company, and also certain holders of unliquidated demands against it, and also the interests of the stockholders of the company. Such interests of the creditors and stockholders became vested in the trustees from time to time, so that on the fourteenth of September, 1867, they were the owners, subject to the terms of the trust agreement, of the rights, claims, and interests of all the creditors and stockholders of the company in its property and franchises, except those existing under a first mortgage made in May, 1853. The trustees issued, in exchange for the interests they so acquired, certificates in two classes, preferred and common. Under an amendment, made in April, 1863, to the trust agreement, the trustees purchased, for the benefit of the trust and the persons interested therein under the agreement of December, 1858, all the stock and a portion of the bonds of the Illinois company of 1851, sometimes called the Western Division.

On the fourteenth of September, 1867, the certificate holders, by an instrument known as "Amendments to the trust agreement of December, 1858," resolved that the trustees had made the purchase of January, 1867, for the benefit of those interested in the trust agreement of December, 1858, and had, in virtue of the amendment of April, 1863, purchased all the stock and a portion of the bonds of the Illinois company of 1851; that, by such purchases, the whole road from Cincinnati to St. Louis had become the property of the trust, subject only to outstanding mortgages; that it was the intention of all parties interested in the trust to form a new corporation, to which the entire property of the trust might be transferred, in accordance with the original agreement, such property to consist of all the rights and interests in the railroad in the three states; that the capital stock of the new corporation should consist of 35,000 shares of preferred stock and 200,000 shares of common stock, being in all $23,500,000 of stock, which should be issued and distributed to the owners of trustees' certificates registered on the books of the trust, as follows, namely, to owners of preferred certificates, preferred full-paid stock, for the amount of such preferred certificates, at the rate of one share of preferred stock for every $100 of preferred certificates; that it should "be declared upon the face of said preferred stock that it is to be and remain a first claim upon the property of the corporation after its indebtedness;" that the holders thereof shall be entitled to receive from the net earnings of the company 7 per cent. per annum upon the amount of said stock, payable semi-annually, "and to have such interest paid in full, for each and every year, before any payment of dividend upon

the common stock of said corporation, and that whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of 7 per cent. on the preferred stock in full, and 7 per cent. dividend upon the common stock for the year in which said net earnings are so applied, then the excess of such net earnings, after such payments, shall be divided upon the preferred and common stock equally, share by share;" that the common stock should be issued to holders of common certificates at the same rate; that the new corporation should be authorized to create a new mortgage on its entire property, consisting of 340 miles of railroad from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding $6,000,000, $4,000,000 whereof should be used exclusively to take up the then outstanding bonds issued under the mortgages theretofore created on said road; that, if a branch should be built to Louisville, the new corporation might increase the preferred stock at the rate of $10,000 for each mile in length of such branch, and the $6,000,000 mortgage to the amount of $15,000 for each mile of such branch; and that holders of the outstanding bonds of the old company, both eastern and western divisions, and holders of bonds to be issued by the new corporation, should be entitled to one vote for each $100 of bonds so held, at all stockholders' meetings, and on all affairs of the corporation.

Under statutes of Indiana and Ohio, Allan Campbell and others, as such trustees, became a corporation in those states by the name of the Ohio & Mississippi Railway Company. Its capital stock was fixed at 35,000 shares, of $100 each, of preferred stock, and 200,000 shares, of $100 each, of common stock, and provision was made, in the certificate of incorporation, for increasing its preferred stock in an amount not exceeding $10,000 a mile for each mile of a branch to Louisville. In November, 1867, the Illinois company and the Indiana and Ohio company were consolidated under the name of the Ohio & Mississippi Railway Company, by articles of consolidation which provided for issuing preferred and common capital stock of the consolidated company to the extent above stated, and that the consolidated corporation should be authorized to create a new mortgage on the road for $6,000,000, of which $4,000,000 should be appropriated and used to take up the then existing mortgage bonds of the property, and should have "all such further powers and rights as are conferred and contemplated in certain amendments adopted by the certificate-holders at a meeting held by them on the fourteenth day of September, A. D. 1867, of an agreement dated December 15, A. D. 1858, of the creditors and stockholders of the Ohio & Mississippi Railroad Company of Indiana & Ohio, said agreement representing a trust which, at the date of said amendments, embodied the entire ownership of the property of both said companies so consolidated."

The consolidated company issued preferred stock to the amount of 35,000 shares, upon certificates in the following form: "Ohio and Mississippi Railway Company. Reorganized and Consolidated 1867. Preferred Stock. This is to certify that —— is entitled to —— shares of the preferred capital stock of the Ohio & Mississippi Railway Company, of $100 each, transferable only on the books of said company, in the city of New York, in person or by attorney, on the surrender of this certificate. The preferred stock is to be and remain a first claim upon the property of the corporation after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company 7 per cent. per annum, payable semi-annually, and to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock; and whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of 7 per cent. on the preferred stock in full, and 7 per cent. dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the preferred and common shares equally, share by share."

These preferred shares were issued in exchange for the trustees' preferred certificates, in pursuance of the resolutions of September 14, 1867. The cross-bill alleges that the certificate-holders, by the resolutions of September 14, 1867, intended and declared that the preferred stock to be issued should give to its holders, not only a preference in respect to dividends over the common stock, but also the preference of a specific and continuing lien and security upon the property of the new corporation, next after the then existing mortgage indebtedness; that it was in accordance with and in execution of this intention that the certificate-holders further resolved that it should be declared upon the face of the certificates of such preferred stock that it should be and remain a first claim upon the property of the corporation after its indebtedness; that the indebtedness referred to in the resolutions, and in the preferred-stock certificates, was such indebtedness only as should arise under the $6,000,000 mortgage, that amount being designed to represent, and having been authorized for the purpose of taking up and canceling, the indebtedness existing at the time of the consolidation on the property of the two consolidating companies; and that the consolidated company, under the articles of consolidation, became bound to perform

the provisions of the amendments of September, 1867, to the trust agreement, as to preferred stock, and the securing the same on the property of the consolidated company to the full intent thereof.

Besides the preferred stock to the amount of $3,500,000, further preferred stock, in the above form, to the amount of $800,000, was issued on the building of the Louisville branch. The plaintiffs in the cross bill, as owners of shares of such preferred stock, aver that they, in common with the other preferred stockholders, had and have a lien and security and first claim upon all the property and franchises of the consolidated company which existed at the time of the original issue of such preferred stock, in or about the year 1867, next after and subject only to the indebtedness under the $6,000,000 mortgage, as authorized by said articles of consolidation, as representing and designed to cover and cancel the only indebtedness on either of the consolidated roads which was outstanding at the time of such consolidation, and are entitled to the payment of interest, as stipulated in the certificate, out of such net earnings of the company as may remain after the payment of interest on first-mortgage bonds, and in priority and preference to the payment of any interest or indebtedness under any mortgage subsequent in date to the first mortgage, that being a mortgage executed in December, 1867, under which bonds to the amount of about $6,800,000 have been issued. Under the so-called second mortgage, issued in March, 1871, and sought to be foreclosed in the original suit, $4,000,000 of bonds have been issued. The other mortgage sought to be foreclosed in the original suit is called the Springfield Division mortgage, and was executed in January, 1875, to secure $3,000,000 of bonds.

The bill prays for a decree that such preferred stockholders are entitled, as such, to, and have always had, a specific and continuing lien and security and first claim upon and in all the property and franchises of the company, next after, and subject only to, the interest and security therein which is given under the first mortgage of December, 1867, and have been and are entitled to receive 7 per cent. interest upon their shares, out of the net earnings of the company remaining after the payment of interest to the holders of the first-mortgage bonds. It also prays that, in any decree of foreclosure of either of the mortgages so sought to be foreclosed, the rights of the preferred stockholders may be declared to be a lien and security on the property and franchises of the company next after that secured by the first mortgage of December, 1867; that, in case of foreclosure of the first mortgage, all surplus, after the satisfaction of claims thereunder, be applied, first, to payment in full, or pro rata, of the par value of their shares, to the preferred stockholders; and that, in case of foreclosure of either the second mortgage or the Springfield Division mortgage, the decree therein shall provide that any sale, in either of such cases, shall be subject to not only the amount due under the first mortgage, but also, and next in order, to the amount at par of the preferred stock, with all unpaid interest due thereon at 7 per cent.

The rights of the holders of preferred stock in this case must be determined by the language of the stock certificate. That is exactly the same as the language of the written instruments which preceded the issuing of the certificates. The shares are shares of the capital stock of the company, though shares with different privileges from shares of the common stock. The certificate declares the quality of the preferred stock in two respects: (1) Its relation to the property of the company; (2) its relation to the net earnings.

As to the property, it is declared that the preferred stock is to be and remain a first claim on the property of the company "after its indebtedness." But it is stock, and part of the capital stock, with the characteristics of capital stock. One of such characteristics is that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid. It would require the clearest language to admit of the application of a different rule to any capital stock. Section 5 of the statute of Indiana of June 15, 1852, "establishing provisions respecting corporations," (1 Davis' St. 369,) enacted as follows: "If any part of the capital stock of such company shall be withdrawn and refunded to the stockholders before the payment of all the debts of the company, all the stockholders of such company shall be jointly and severally liable for the payment of such debts." The railroad law of Indiana of March 3, 1865, (1 Davis' St. 730,) entitled "An act to authorize, regulate, and confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers, and to define their rights, powers, and privileges, to enable such corporations to purchase and construct connecting and branch roads, and to operate and maintain the same," under which law this company was reorganized, provided, in section 5, that the corporation should have power to "make preferred stock, make and establish preference in respect to dividends in favor of one or more classes of stock over and above other classes, and secure the same, in such order and manner, and to such extent, as said corporation may deem expedient;" and section 20 of the general law of Indiana of May 11, 1852, providing for the "incorporation of railroad companies," (1 Davis' St. 706,) provided that a corporation organized under it might issue "a preferred stock to an amount not exceeding one-half of the amount of its capital, with such priority over the remaining stock of such company, in the payment of dividends, as the directors of such

company may determine, and shall be approved by a majority of the stockholders." It would be difficult to say that these statutory provisions allowed any preference in shares of capital stock, except a preference among classes of shares, or any preference of any class of shareholders over creditors. It is not to be supposed that those engaged in reorganizing this company intended to violate the law of Indiana, or the general principles of law applicable to private corporations. Nor is there anything to show that they did. The language of the certificate is entirely satisfied by referring it to a priority in rank of the preferred stock over the common stock; to a first claim of the preferred stock on the property of the corporation, after its indebtedness should be paid, when there should be moneys to be divided among stockholders,—a claim which should be first as compared with the claim of other stock. Claims of stockholders, as such, on the corpus of the property of the company in which they are stockholders, do not arise until the debts of the company are paid. Until then the shares confer rights merely as regards profits and voting power.

It is urged, for the appellants, that the expression "after its indebtedness" means, next after the indebtedness then existing or then authorized; that the preferred stock was issued to the holders of preferred certificates, owners of the property, as a quasi purchase-money mortgage on its sale; and that they intended to preserve their position except as to the new $6,000,000 mortgage, because they authorized that and did not authorize any other. It is very certain that at best the words "after its indebtedness" are, by themselves, ambiguous on their face, and are as capable of being applied to future indebtedness as of being limited to then existing indebtedness. Under the general rules applicable to the position of the stockholders of a corporation as regards its creditors, a claim of the kind here made should rest on clear and not doubtful language. But the provision which follows, as to the rights of the preferred stock in the net earnings of the company, leaves no doubt as to the meaning of the whole. There is a unity of right in the claim of the preferred stock on the property of the company, and in the title of its holder to receive a share of the net earnings of that property. His proprietorship in those earnings is a right to receive from them so much a year, if earned, before the common stock receives any dividend therefrom, and, when the two classes of stock have each received the same specified amount out of the year's net earnings, he has the right to share equally in the surplus with the holder of common stock. Thus he can have no income on his stock unless there are net earnings. Those net earnings are what is left after paying current expenses and interest on debt, and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay. The holders of preferred stock have the same relation, by virtue of the certificate, to the corpus of the property, which they have to its net earnings. Their position in regard to both is one inferior to that of all creditors. They are not preferred as to reimbursement of principal, or as to a right to net earnings, over any one but the holders of common stock. The interest to be paid to them is not to be paid absolutely, as to a creditor, but only out of net earnings—the same fund out of which the dividends on common stock are to be paid. Though called "interest," it is really a dividend, because to be paid on stock and out of net profits. There was no restriction on the creation of future indebtedness, and, necessarily, the net earnings of future business would be ascertained in reference to such future indebtedness and the interest on it; and the words "its indebtedness," in the same sentence, naturally mean "its future indebtedness," in reference to which the net earnings subsequently treated of are to be ascertained. Creditors may resort to the body of their debtor's property for interest as well as principal. But these holders of preferred stock are limited, for any income or interest, to the net earnings. There is nothing in the certificate which clothes them with a single attribute of a creditor, while it specially gives them, as stockholders, an equal interest with the common stockholders in the excess of net earnings in each year, after paying therefrom 7 per cent. on each share of stock, preferred and common.

Whatever position the holders of preferred certificates occupied before they accepted preferred stock, whatever special right of lien they had, they became corporators, proprietors, shareholders, and abandoned the position of creditors, and took up towards existing and future creditors the same position which every stockholder in a corporation occupies towards existing and future creditors. His chance of gain, by the operations of the corporation, throws on him, as respects creditors, the entire risk of the loss of his share of the capital, which must go to satisfy the creditors in case of misfortune. He cannot be both creditor and debtor, by virtue of his ownership of stock. In this case all the parties holding trustees' certificates united to form the new corporation, and converted themselves into stockholders in it.

It seems very clear that if the trustees representing the holders of trustees' certificates had gone on and operated the road for them, not organizing a new company, any debts contracted by the trustees in the business would have had priority over the claims of the holders of such certificates. So, in becoming stockholders in the new company, with the right to vote as to its management, and to share in its earnings, they must have intended to allow, through the corporation, a priority of like debts over their claims as stockholders.

The same principles must govern the present case which were applied by this court in St. John v. Railway Co., 22 Wall. 136, where creditors took preferred stock. It was held that they ceased to be creditors and could be regarded only as stockholders, with a chance for dividends out of net earnings and the power of voting, and a priority over holders of common stock, but not a priority over debts subsequently contracted.

Much stress is laid on the averment in the cross-bill that the existence of the preferred stock and of the certificates therefor and of their contents was known to the trustees under the subsequent mortgages before those mortgages were made, and to the bondholders under those mortgages before they became such; and it is urged that the assent of the preferred stockholders to the creation of the subsequent mortgages should have been obtained. The answer to this view is that the preferred stockholders had no rights which made their assent necessary to the validity, as against them, of the mortgages in question; and that, represented as they were by the corporation and its directors, the act of making the mortgages was a sufficient assent of the preferred stockholders, if assent were necessary, there being no allegation in the cross-bill inconsistent with the fact that the issuing of the mortgages was known to and participated in and sanctioned by those who were holders of the preferred stock when the mortgages were created.

As to the claim that the appellants, if they have no priority over the second mortgage, have, at all events, as against the company, a lien next after the second mortgage on the property not covered by the Springfield Division mortgage, and have, in any aspect of the case, a valid claim on the surplus assets of the company, after paying its debts, superior to the claim of the common stockholders, it is sufficient to say that we do not deem it proper that those questions should be disposed of on a demurrer to this cross-bill, as they can be raised and decided under the answer which these appellants have filed as defendants in the consolidated suit.

The decree of the circuit court is affirmed.

Entry without right. Rails become part of realty.

MERIAM v. BROWN et al.

(128 Mass. 391.)

Supreme Judicial Court of Massachusetts. Feb. 27, 1880.

Bill for injunction restraining defendants from removing certain buildings, sleepers, and iron rails placed on plaintiff's land by the Billerica & Bedford Railroad Company. The facts sufficiently appear in the opinion. There was a decree for plaintiff. Defendants appeal. Affirmed.

S. Hoar, for plaintiff. C. Brigham, for Brown. E. B. Callender, for the assignees.

AMES, J. "The general rule is that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction." Wilde, J., in Pierce v. Goddard, 22 Pick. 559. It has been held, also, that the rails laid upon the roadbed, and fastened there, so that engines and cars can pass over them, become annexed to the realty, and cease to be personal property, in the absence of any agreement changing the ordinary rule of law. Hunt v. Iron Co., 97 Mass. 279. It appears that the railroad company, although it has constructed the track upon the plaintiff's land, has never filed any written location, has presented no plan, and has neither paid nor tendered to the plaintiff any damages for land taken. St. 1874, c. 372, § 58 et seq. It has also ceased to do business, has become bankrupt, and its assignees have undertaken to dispose of all its property, and substantially to abandon the use of its tracks. Not having filed any written location, the corporation has not taken or appropriated the plaintiff's land for its own use in such a sense as to justify its entry upon it, or to give it any legal title or right to use or occupy it. Hazen v. Railroad Co., 2 Gray, 574. It cannot enter upon it, except as a trespasser, even for the purpose of removing the rails which it has placed there, and which, by their annexation to the soil, it has lost the right to remove. The cases cited by the defendants are cases of roads regularly located, or in which the rails were laid with the consent of the owner of the soil, or in which the attempt to remove them was made after an acquiescence on the part of such owner for seven or eight years. In the case at bar, we find no evidence of any such consent; and, even if there had been such consent by the owner of the equity, it could not avail against a title derived from the foreclosure of the mortgage. Perkins v. Pitts, 11 Mass. 125. Decree affirmed.

Contra, Toledo R. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; Jones v. New Orleans & Selma R. R. Co., 70 Ala. 227, infra, p. 55.

Specific performance of covenant to maintain depot. Condition subsequent, styled a covenant. Public policy. Regulation of railroad operation by a court. Money compensation.

BLANCHARD v. DETROIT, LANSING & LAKE MICHIGAN R. R. CO.

(31 Mich. 43.)

Supreme Court of Michigan. Jan. Term, 1875.

Appeal from circuit court, Ionia county; in chancery.

GRAVES, C. J. The court below having dismissed the complainant's bill after hearing on pleadings and proofs, he has appealed to this court.

He sets up a conveyance made by himself and wife to the Ionia & Lansing Railroad Company in June, 1870, of certain ground on his farm, for a track and depot, the subsequent consolidation of that company with the Detroit, Howell & Lansing Railroad Company, and the assumption by the resulting organization of the name ascribed to defendants in the title of the cause.

The consideration clause of this deed stated that the conveyance was made "in consideration of five hundred dollars and the covenant to build a depot hereinafter mentioned," and following the description and preceding the habendum was the following clause: "But this conveyance is made upon the express condition that said railroad company shall build, erect and maintain a depot or station house on the land herein described, suitable for the convenience of the public, and that at least one train each way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot." Apart from these passages the deed was in common form, and silent in regard to a depot. Together with other matters not necessary to be mentioned, the bill alleged acceptance of the deed, and that the company built the road over the land granted, and that for some time past the consolidated organization has used and occupied the road for running trains; that complainant, in granting to the company, was largely influenced by his expected accommodations, in having a depot at his place, and the rise in value which it would cause to his surrounding property; that by accepting the grant the company became bound to perform as specified in the second of the foregoing clauses, but have totally refused to comply with, or abide by it, and that complainant is entitled to insist on specific performance, or if that be found improper, then to such compensation as will indemnify him.

The answer asserts, and this is admitted, that the deed was wholly prepared by complainant's legal adviser, and that complainant refused to convey on any other terms. The answer then avers that the clause concerning a depot, and now assumed by complainant to operate as a covenant, is not one, nor entitled to operate as one, but is simply and purely a condition subsequent, and that the company, having become satisfied that compliance with it would be detrimental to the public interest and their own, decided not to observe it, and had therefore refused to abide by it.

The answer also claims the benefit of a demurrer for want of equity.

A peculiar feature of this clause is, that it is the grantee, and not the grantor, as is almost invariably the case, who maintains that the important clause in the grant which the grantor relies upon as a covenant, is a condition, and one, too, which the grantee has distinctly violated. This is the more noticeable since one of the settled rules for deciding in doubtful cases that the writing is a covenant, and not a condition, is based on the idea that a condition, as tending to destroy the estate, would be less favorable to the grantee. 4 Kent, Comm. 129, 132.

The position of these parties confounds the reason of this rule, and would dispense with the rule itself if the case were a doubtful one. Catlin v. Springfield Fire Ins. Co., 1 Sumn. 434, 440, Fed. Cas. No. 2,522.

The real questions necessary to be decided will hardly admit general reasoning or nice deductions. Aside from reasons very manifest, they depend upon authority, and can only be lawfully determined in accordance with principles which have been fully recognized and adjudged. And the circumstance, that one of the parties is a natural and the other an artificial person, gives no significance whatever to the legal merits, nor does it in any manner bear upon the proper exposition and application of the controlling principles.

The complainant and the other party to the grant, being both competent, and able to act independently and look after their respective interests, voluntarily bargained with each other, and complainant, being assisted by counsel, caused a provision couched in terms of his own choice to be incorporated in the grant, and the grantee deliberately accepted the grant so drawn, and the defendant, as successor of the grantees, expressly and finally refuses to execute the provision in question.

After insisting that this provision was binding on them in no other sense or extent than as a condition subsequent, and as a necessary consequence that it affords no basis whatever for any relief exclusively dependent upon promissory undertaking, the defendant further insists that if the controverted clause, or rather the clause of which the nature is controverted, were to be regarded as promissory, still its positive enforcement must be declined in equity, first, on the ground of public policy, and second, on the ground that its requirements are on the one hand positively unsuitable to be enforced by chancery, and on the other hand that in many indispensable particulars the subject matter is left

too much at large, too vague, and too much in want of detail, to admit of execution by the court.

The first question for consideration appears naturally to be, whether the particular clause in the deed is a covenant or mere condition subsequent, having no promissory force; and this is purely a question of authority. The language of the clause itself is plain and unambiguous, and the grant must have effect according to the legal interpretation and meaning of its terms, and not according to any erroneous impression either party may have formed respecting its operation. Furbush v. Goodwin, 5 Fost. (N. H.) 425.

Much stress was placed by complainant's counsel upon the phrase in the consideration clause, which speaks of an after-mentioned covenant to build a depot. Now this expression must be taken to refer to the subsequent clause about whose operation the parties differ, or it must otherwise be taken as a mere purposeless expression.

The reasonable opinion would seem to be, that this statement in the consideration clause was actually intended to refer to the later provision respecting the depot, and to expressly mark that the right it evidenced was part of the consideration.

It is hardly admissible to suppose that the grantor carefully introduced this phrase, and then omitted to insert anything to satisfy what he considered the phrase called for.

But, conceding the expression was meant to apply to the subsequent passage, it is another and very different question, whether it is entitled to control the proper meaning and nature of that passage. It may be fully admitted that if the terms of the main clause were not clear and strong to fix its legal character, or if the other portions of the instrument were such as to cause the mind to besitate about its legal significance, the words of the consideration clause might be resorted to, to help to a conclusion in harmony with the literal import of these words. But this is not the case. Apart from the expression in the consideration clause, the subsequent provision, as well as the residue of the instrument, is too perfectly worded and too precise, to admit of any doubt whatever.

Independently of such first expression, there is no ambiguity, and no obscurity.

Now, in alluding as they did, when writing down the statement of consideration, to the positive provision as a covenant, we may suppose that at the most the parties manifested their opinion of the legal nature of the stipulation. But as this clause was precisely in the form desired, their opinion of the character the law impressed upon it, or their idea of the name belonging to it, whether indicated by giving it a specific designation, or in some other way, cannot alter its necessary legal nature. The books are full of illustrations of this point. When an instrument or provision is clearly and distinctly so drawn and consummated that the law at once attaches, and determines that it possesses a specific legal nature, and exclusively belongs to a given class of transactions, the parties cannot, by arbitrarily assigning a name to it wholly foreign to its true character, succeed in transforming it, and so cause it to stand and operate in a manner wholly alien to it. To conclude otherwise would be to reject the legal criteria of certainty in written transactions. Radcliff v. Rhan, 5 Denio, 234; Scudder v. Bradbury, 106 Mass. 422; Pearce v. Grove, 3 Atk. 522; Rice v. Ruddiman, 10 Mich. 125; Railroad Co. v. Trimble, 10 Wall. 367; 1 Cow. & H. Notes, 211 et. seq. Even when the legislature holds a mistaken opinion concerning the law, it does not change it. Postmaster General v. Early, 12 Wheat. 136; Talbot v. Seeman, 1 Cranch, 1; Mersey Docks v. Cameron, 11 H. L. 443, per Lord Chelmsford, page 518; Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 285. A plain condition cannot be converted into a perpetual covenant by calling it one. This sentence, then, cannot be allowed to alter the intrinsic nature of the main provision. In noticing the position that the consideration clause in the deed ought to help to an opinion that the second clause constituted a covenant, and not a mere condition subsequent, we have assumed that the terms of this second clause are so clear and explicit that there is no room for any real question touching its intrinsic legal nature and true denomination. A few words may be now proper to sustain the validity of this assumption. We have seen the language of the provision; and its position in the instrument, as well as its authorship, has been explained.

How do the authorities apply to it? An estate upon condition is one which has a qualification annexed, by which, on the happening of a particular event, it may be created, enlarged or destroyed. If set forth, the condition is express; and if it allows the estate to vest, and then to be defeated in consequence of non-observance of the requirement, it is a condition subsequent. 2 Bl. Comm. c. 10; 4 Kent, Comm. "Of Estates on Condition"; Co. Litt. 201a, 215a, 215b, 233b, 234b, 251b; Bac. Abr. tit. "Conditions"; Com. Dig. tit. "Conditions"; Shep. Touch. c. 6, "Of Conditions."

The author of the Touchstone says: "Conditions annexed to estates are sometimes so placed and confounded amongst covenants,—sometimes so ambiguously drawn,—and at all times have in the drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which, in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as: proviso, ita quod, and sub condi-

tione. And, therefore, if A grants lands to B, to have and to hold to him and his heirs, provided that,—or so as,—or under this condition,—that B do pay to A ten pounds at Easter next; this is a good condition, and the estate is conditional without any more words." Page 121. See, in addition to the books last cited, Washb. Real Prop., and Hil. Real Prop. The question whether there is a limitation or a condition, or whether there is a condition precedent or subsequent, or whether what is to be expounded is a condition or covenant, or something capable of operating both ways, frequently becomes very perplexing in consequence of the uncertain, ambiguous, or conflicting terms and circumstances involved; and the books contain a great many cases of the kind, and not a few of which are marked by refinements and distinctions which the sense of the present day would hardly tolerate.

Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant.

Among the numerous cases serving to illustrate the subject, which have been examined, the following may be referred to: Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225, 229, 230, 249–256; Merritt v. Harris, 102 Mass. 326; Tilden v. Tilden, 13 Gray, 103; Gray v. Blanchard, 8 Pick. 284; Attorney General v. Merrimack Manuf'g Co., 14 Gray, 586; Allen v. Howe, 105 Mass. 241; Jackson v. Florence, 16 Johns. 47; Jackson v. Allen, 3 Cow. 220; Livingston v. Stickles, 8 Paige, 398; Stuyvesant v. Mayor, 11 Paige, 414; Palmer v. Ft. Plain & C. Plank-Road Co., 11 N. Y. 376; Hefner v. Yount, 8 Blackf. 455; Cross v. Carson, Id. 138; Sperry's Lessee v. Pond, 5 Ohio, 387; Wheeler v. Walker, 2 Conn. 196; Willard v. Henry, 2 N. H. 120; Doe v. Asby, 10 Adol. & E. 71; Churchward v. Queen, L. R. 1 Q. B. 173, per Shee, J., 211; Mead v. Ballard, 7 Wall. 290.

The cases are of course numerous where, on controversy about the meaning or operation, the writing has been held either to create a limitation or a covenant, or to work both as a condition and covenant. But on examination it will appear that in all the cases in which it has been deliberately determined that the writing, though possessing many or all of the characteristics of a condition, was still susceptible of operating as a covenant, there were grounds for claiming that promissory words existed, or at least words which, in the light of pertinent facts, were fairly capable of a promissory sense. Among the cases of this class, are the following: Spaulding v. Hallenbeck, 35 N. Y. 204; Stuyvesant v. Mayor, ubi supra; Doe v. Watt, 8 Barn. & C. 308.

And it is believed that no considered case can be shown, that assumes to decide that a writing which, like that before the court, precisely answers, in verbiage, position, and relative facts, to all the requirements of an express condition subsequent, and stands without any thing except the hasty opinion of the grantor to gainsay its apparent legal nature, is either a covenant, or susceptible of being proceeded on as a covenant, in opposition to a claim by the grantee that it is a bare condition, and which by his non-observance has entitled the grantor to forfeiture.

The result, upon the whole, is, that the provision relied on by complainant as a covenant to be specifically enforced against the defendants, must be considered an express condition subsequent, and not a covenant, and not specifically enforceable against defendants as one.

Having reached this conclusion, this opinion might here end. But, as the case was fully argued in another aspect, it is deemed admissible to go further.

Supposing it to be admitted that the provision in the grant is susceptible of being understood in a promissory sense, and is capable of being considered as in the nature of an agreement by the defendants with the complainant, is it capable of specific enforcement by the court? Setting aside the objection founded on public policy, which is not examined, are the requirements in the writing of such a nature, and so fully and clearly marked out, defined, identified, or indicated, as to make specific execution by the court practicable? We had occasion in the recent case of Buck v. Smith, 29 Mich. 166, to submit some observations respecting the power and duty of the court to execute agreements for the performance of an indefinite number and variety of future acts within the scope of a business not distinctly and exactly mapped out and particularized, and what was there stated has some application here.

The jurisdiction of equity in specific performance proceeds on the supposition that the parties have not only agreed, as between themselves, upon very material matter, but that the matters so agreed on are of such a nature, and the subjects of enforcement so delineated or indicated, either directly or by reference to something else, or so raised to view by legitimate implication, that the court can and may collect, and in their proper relations, all the essential elements, and proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed.

If, however, it appears, either that the things to be performed are in their nature incapable of execution by the court, or that needful specifications are omitted, or that

material matters are left by the parties so obscure or undefined, or so in want of details, or that the subjects of the agreement are so conflicting or incongruous, that the court cannot say whether or not the minds of the parties met upon all the essential particulars, or if they did, then can not say exactly upon what substantial terms they agreed, or trace out any practical line where their minds met, the case is not one for specific performance.

As the court does not make contracts for parties, so it never undertakes to supply material ingredients which they omit to mention, and which cannot be legitimately considered as having been within their mutual contemplation. And where the party to perform is left by the agreement with an absolute discretion respecting material and substantial details, and these are therefore indeterminate and unincorporated until by his election they are developed, identified, and fixed as constituents of the transaction, the court cannot substitute its own discretion, and so by its own act perfect and round out the contract. If the court were to do this, it would be to assume a right not belonging to it, but one which the parties reserved to themselves.

Now what is it that the complainant in this cause asks the court to execute?

It is—First, that defendants shall make and maintain on the premises a depot or station-house, suitable for the convenience of the public.

Second, that during all future time, when trains run on the road, at least one train each way shall every day stop thereat; and

Third, that in all future time freight and passengers shall be regularly received and discharged at such depot.

It is extremely plain that the requirements for stopping trains and receiving and discharging freight and passengers were leading objects, and that the building a station-house was of secondary consideration. The putting up of such a building could be of little consequence if no trains stopped there. The other requirements should therefore be regarded as the chief subjects of complainant's equity.

Supposing all other objections removed, is it practicable for the court to execute them? May it take upon itself for all the future to supervise the daily running and stopping of trains, both of passengers and freight, and the regularity of action in regard to the reception and discharge of passengers and freight?

If the writing embodies any promissory agreement at all, it is that when and so long as trains run on the road, one train each way shall every day stop at this place, and also that passengers and freight shall be there regularly received and discharged.

Waiving all considerations of possible future action by government under the postal, war, police, or other power, inconsistent with any particular decree which might now be made, can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it take notice, or legitimately and truly ascertain from day to day, what amounts to regularity in the receipt and discharge of passengers and freight? Can it have the means of deciding at all times whether the due regularity is observed? Can it superintend and supervise the business, and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one station on the road, it may with equal propriety, upon a like showing, do the same in regard to all stations on the road, and not only so, but in regard to all stations on all the present and future roads in the state.

That any such jurisdiction is impracticable, appears plain, and the fault lies in the circumstance that the objects of the parties, as they were written down by them, are by their very nature insusceptible of execution by the court.

In this connection we may refer to a few cases. Raynor v. Stone, 2 Eden, 128, was a case for specific performance of several stipulations by the defendant in a lease. Among others, were agreements to mend hedges and fences, and keep the mansion house and other buildings in repair. The defendant having demurred, Lord Northington allowed the demurrer, and in the course of his opinion observed, that the remark of counsel, that he had no officer to see to performance, was very strong. "How," he remarked, "can a master judge of repairs in husbandry? What is a proper ditch or fence in one place, may not be so in another. How can a specific performance of things of this kind be decreed? The nature of the thing shows the absurdity of drawing these questions from the proper trial and jurisdiction."

In Gervais v. Edwards, 2 Dru. & War. 80, specific performance of an agreement between the parties for straightening a crooked river which divided their lands was sought, and the contract contained stipulations for mutual compensation for the soil which might be shifted from one to the other, and in regard to the contingent damages which might afterwards happen. The complainant waived all right on his part to future and contingent damages. The chancellor, Sir Edward Sugden, refused to decree performance, however, and some of his observations are so explicit and appropriate, that a somewhat extended quotation will not be deemed objectionable. He said: "As far as the merits of the case go, I would decree the specific execution of this contract; but I do not see how it is possible. If I execute it at all, I must execute it in toto; and how can I execute it prospectively? The court acts only on the principle of executing it in specie, and in the very terms in which it has been made; therefore,

when you come to the specific execution of a contract containing many particulars, you must see that it is possible to execute it effectively. The court cannot say that when an event arises hereafter, it will then execute it. In the case of a decree for the execution of a contract for the sale of timber, it is no objection that it is to be cut at intervals; that is certain, and there mere delay will not prevent the court from executing it; there the agreement is executed in specie; the court decrees to one the very timber contracted for, to the other the very price. If I am called on now to execute this agreement, I can only specifically execute a portion; whereas I am bound to execute it all." He afterwards added, "No precedent has been cited; but, indeed, none is necessary. It is a question of principle; and I am clearly of opinion that if I gave a decree now, it would not be a specific execution of the contract, but only a declaration that there ought to be a specific execution of it hereafter. I must therefore leave the plaintiff to his remedy at law."

Blackett v. Bates, 1 Ch. App. 117, was where an award required that the defendant should execute to the plaintiff a lease of the right of such part of a railway made by the plaintiff as was on the defendant's land, the lease to be in the words set out in the award; and that the defendant should be entitled to run carriages on the whole line, on certain terms, and might require the plaintiff to supply engine power, while the latter should have an engine on the road; and that the plaintiff, during the whole time, should keep the entire railway in good repair. Differences having arisen about carrying out the award, a bill was filed for specific performance, which was demurred to generally, for want of equity. In support of the demurrer it was pertinently observed by counsel that "whether if the court had legislative power it would be desirable to make parties perform in specie all manner of contracts, was not then the question. That the court only decreed specific performance when it could dispose of the matter by an order capable of being enforced at once, and did not decree a party to perform a continuous duty extending over a number of years, but left the party to his remedy at law." Lord Cranworth acceded to this view, and observed, "that the court had no means of enforcing the performance of daily duties during the term of the lease; that it could do nothing more than punish the party by imprisonment or fine, in case of failure to perform them, and might be called on for a number of years to issue repeated attachments for default." He cited Gervais v. Edwards with approbation.

In Marble Co. v. Ripley, 10 Wall. 339, the court acted on the same principle. The contract concerned the use and mode of enjoyment of a quarry, and contained particular stipulations as to the future rights and privileges of the parties. Among other things, the court remarked, that "if performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, or whether it was of suitable size or shape or proportion. It is manifest that the court cannot superintend the execution of such a decree. It is quite impracticable, and it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder." Port Clinton R. Co. v. Cleveland & T. R. Co., 13 Ohio St. 544, is cited with approval. Among other authorities which tend to illustrate the subject, see Baldwin v. Society for Diffusion of Useful Knowledge, 9 Sim. 393; Hamblin v. Dinneford, 2 Edw. Ch. 529; De Rivafinoli v. Corsetti, 4 Paige, 264; Sanquirico v. Benedetti, 1 Barb. 315; Dodd v. Seymour, 21 Conn. 476; Waters v. Taylor, 15 Ves. 10–25.

Without going further into this view of the case, it is only needful to say, that it seems obvious that the very nature of the provision sought to be enforced is such as to render the remedy impracticable.

But if this objection were not insuperable, there would be still another in the want of details and lack of particularity and specification.

The specific location is not given for the building, nor is there anything certain as to the plan, size, shape, materials or arrangement of the building. All this appears to have been left, by the assent of the parties, substantially to the judgment and discretion of the grantees.

The only specification, the only limit upon such judgment and discretion, the parties saw fit to make, was that it should be suitable for the convenience of the public. For many purposes this might be considered definite enough. It would be in a charter in which the end to be obtained would be presented as the object of the legislature, whilst everything in regard to details and means would be rightly and purposely left to the company. But for a building contract, or an agreement to be executed by the court, it is not so.

If the court were to attempt to decree, what direction could it give as per contract, in regard to the plan, size, shape, materials, arrangement and cost? If what would now satisfy the interest of the public were known, it might guide as to the present size and arrangement; but it could go no further. What is needful now may be otherwise in time, and future changes in the state of the country or in business may wholly disappoint all present calculations. The public interest may require many alterations. But the reference to the public convenience gives no clue whatever as to the materials, or in regard to other essential matters.

The other parts of the provision are also marked by similar difficulties; but it is need-

less to dwell upon them. Among many others we cite the following authorities as going to explain this feature of the case: McClintock v. Laing, 22 Mich. 212; Tatham v. Platt, 15 Eng. Law & Eq. 190; Harnett v. Yielding, 2 Schoales & L. 549; Colson v. Thompson, 2 Wheat. 336; Boston & M. R. Co. v. Bartlett, 3 Cush. 224; German v. Machin, 6 Paige, 288; McMurtrie v. Bennette, Har. (Mich.) 124; Webb v. Direct London & P. R. Co., 1 De Gex, M. & G. 521, 9 Eng. Law & Eq. 249; Stuart v. London & N. W. Ry. Co., 1 De Gex, M. & G. 721, 11 Eng. Law & Eq. 112, and comments on these cases in Hawkes v. Eastern Counties Ry. Co., 1 De Gex, M. & G. 757, 15 Eng. Law & Eq. 358, and 5 H. L. 331; South Wales Ry. Co. v. Wythes, 1 Russ. & J. 186, 5 De Gex, M. & G. 880, and 31 Eng. Law & Eq. 226. Also 3 Pars. Cont. 354 et seq.; Fry, Spec. Perf. cc. 1, 3, 4.

On this phase of the case, then, the difficulties are insurmountable.

The alternative request for an allowance of damages, or something in the nature of compensation, by the court, must of course fail.

If the case stood upon any final ground which would permit such an appeal to the jurisdiction of chancery, it could not be justly sustained.

In the first place, the uncertainties and lack of details which mark the case, the want of land-marks, boundaries, and specifications, the absence of proper data, and the aptness of the subject for a jury, would induce the court to decline. Pratt v. Law, 9 Cranch, 456; Morss v. Elmendorf, 11 Paige, 277; Fry, Spec. Perf. "Compensation," §§ 813, 814; 3 Pars. Cont. 402, 403, and notes.

But again, if the writing is treated as a promissory undertaking which is binding on the defendant, what it stipulates for is chiefly and mainly a series of daily acts to extend through all the future, and a full and complete award, which, according to the settled course of the court and the principles on which alone it intervenes, is the only admissible one, would be utterly impossible upon any data now afforded, or which can now be afforded.

So many changes of a nature to affect the question are not only possible but probable, that any attempt by the court to adjudge specific compensation in money, in lieu of performance for all future time of the requirements in the writing, would be wild and absurd. A partial award, one for present damages, would not only be futile, but would be an unwarranted departure from principle. The ground of equitable interference, or at least one ground, is, to do at once and in one case final and complete justice. The court always seeks to avoid piece-work determinations.

In the introduction to Adams, Eq. it is said: "The equity for performance with compensation may be enforced by either the vendor or purchaser, but is of course more readily granted to the latter; in either case the defect must be one admitting of compensation, and not a mere matter of arbitrary damages, and the compensation given must be really compensation for a present loss, and not indemnity against a future risk." Page 68. See, also, the body of the work, page 109, margin, and cases cited.

For the reasons given the decree below must be affirmed, with costs.

The other justices concurred.

Taking land already devoted to public use. Construction of statute. Implied powers.

Matter of BOSTON & ALBANY R. R. CO.

(53 N. Y. 574.)

Court of Appeals of New York. Nov. 11, 1873.

Condemnation proceedings, brought by the Boston & Albany Railroad Company, to acquire land which had already been appropriated for a village park. From an order of the general term affirming an order of the special term taking the land for the use of petitioner, the village appeals. Reversed.

Amasa J. Parker, for appellant, village of Greenbush. Geo. W. Miller, for respondent, Boston & A. R. Co.

ALLEN, J. The only fact material upon this appeal is that the lands sought to be taken for the purposes of the railroad corporation were donated to the village of Greenbush by the former proprietors as and for a public park, and dedicated to the use of the public as such. The evidence bearing upon the necessities of the corporation for more lands in the vicinity of these for its purposes, and the comparative fitness of those proposed to be taken and other lands near them, can hardly be considered by us. To a large extent the company must be left, under the delegation of power to it by the state, to determine the extent of its wants, and fix upon the particular location of the lands to be taken, subject to this qualification, that the purposes for which the lands are proposed to be taken must be those for which the company was incorporated, and strictly within its chartered rights. A reasonable necessity must be shown, or, in other words, there must not be an evident and apparent absence of all occasion or necessity for the property for the legitimate purposes of the corporation. Railroad Co. v. Kip, 46 N. Y. 553.

The question here grows out of the character of the lands proposed to be taken, and the title by and purposes for which they are held by the village of Greenbush. They are not the property of individual citizens, neither are they held and owned by the village of Greenbush as its absolute property, but upon a special trust and for public use. The village could not dispose of them or divert them from the purpose to which they were dedicated. Anderson v. Railroad Co., 9 How. Prac. 553.

That the legislature has control of and power over all property held by municipal corporations for public use, whether for the use of the inhabitants of the particular locality or of all the people of the state, except as such power may be affected by the terms and conditions of the grant to the municipality, is unquestioned. People v. Kerr, 27 N. Y. 188.

Questions have arisen, in some instances, whether the construction of a railroad upon the surface of a public highway or street was an appropriation of the land to another and different use from that for which it had been taken and used, the claim being that the two uses were of the same general character, the diversity being in the manner and not in the character of the use, and that the construction of the railroad was not therefore a new or different appropriation of the property. That question is not in this case. It is not denied that a taking of this property by the applicant, and a user of it for the purposes of the corporation, is utterly inconsistent with its use as a public park, and that the village of Greenbush, as the trustees, and the people as the cestuis que trustent, will be absolutely deprived of all benefit in and use of the property, and the possession of the railroad corporation will be exclusive as of property taken under the act from private individuals. Laws 1850, c. 140, § 17.

The sole question then is whether the legislature has conferred upon the applicant the power to enter upon and take possession of property already held and dedicated by authority of law to one public use, for another and entirely different use, also declared to be public. The authority must be sought in the statutes by which all the powers which railroad corporations may exercise over property, without the consent of the owners, are conferred, and if not found, then it does not exist. It must be expressly conferred, that is, in direct terms or by necessary implication; and the implication does not arise, if the powers expressly conferred can, by reasonable intendment, be exercised without the appropriation of property already actually held and used for another public use. Inhabitants of Springfield v. Connecticut R. R. Co., 4 Cush. 63.

The power is general to acquire title to "any real estate required for the purposes of the incorporation." Act 1850, c. 140, § 13. But this does not, prima facie or presumptively, include property already in public use under the sanction of the law. There is no implied supremacy of this particular public use over every other known to the law, so as to permit a railroad corporation, without the further and direct sanction and permission of the legislature, to override and subvert every appropriation of property to other public uses. Section 14 of the act prescribes the procedure for the appropriation, and directs that the petition shall, among other things, state that the company has not been able to acquire title thereto, and the reason of such inability; and the inability recognized in section 13 is that of being unable to agree for the purchase. It is said, and I think with entire accuracy, in Anderson v. Railroad Co., supra, although not necessary to the decision, that the right of way over a public park or square, set apart and held for public use, cannot be acquired by a railroad corporation under these provisions. But the same distinguished judge intimates that title or a right of way may be acquired over property thus held by a municipal corporation upon such a trust, under section 26

of the same act, authorizing and regulating proceedings for taking lands when the title is vested in any trustee, not authorized to sell, or in any infant, idiot, lunatic, etc. The plaintiff was defeated in that action for want of title to sue, and hence the intimation was obiter, although entitled to great respect by reason of the character of the judge from whom it emanated. But I am not able to concur in his views. The trusts meant by the provision were private and individual trusts, and not public trusts or property held by public corporations for public use. But one class of trusts was intended, and that was the class of private trusts within the same category and the same general rules as are applicable to individual and private property held by those incompetent to sell the same. It would be an unwarrantable extension of the provision by implication to include within it all public as well as private and individual trusts. Other legislative provisions show that property held by public officers or public bodies for public use was not intended to be brought within the provision. Section 24 makes provision for the crossing of another railroad or highway, turnpike and plankroad, and section 28, subd. 5, permits railroads to be constructed across, along or upon any street, highway, plankroad or turnpike, but upon condition that the same be restored to its former state, or to such state as not unnecessarily to impair its usefulness, and an order of the superior court upon cause shown is necessary to the exercise of this power.

These provisions confer all the authority that exists in railroad corporations to enter upon and take possession of property held for public use. Another section (section 25) authorizes the taking lands owned by the state or any county or town, but this has relation to property of which the state or a county or a town is the proprietor, and not that held in trust for the use of the public. Every power granted in terms can be exercised, and all the purposes for which the corporation was created can be answered, without the exercise of this power to take property held by a public corporation for the use of the public as a park or common, and hence the power does not result by necessary implication, and not being granted in express terms, does not exist. People v. Law, 34 Barb. 494, and People v. Kerr, 27 N. Y. 188, were under statutes expressly authorizing the use of the public streets for a railroad track (chapters 411, 513, Laws 1860), and the only question was as to the relation of the city of New York to the streets, and the nature and extent of private or individual interests in the streets of that city. Armington v. Barnet, 15 Vt. 745; and Bridge Co. v. Dix, 16 Vt. 446, 6 How. 507, arose under a statute of Vermont expressly permitting, when in the judgment of the supreme court or county court the public good required it, the taking of any real estate, easement or franchise of any turnpike or other corporation for the construction of a new highway. The cases merely involved the question of legislative power and the construction of the statute. Freeholders of Monmouth Co. v. Red Bank & H. Turnpike Co., 18 N. J. Eq. 91, is foreign to this case, merely deciding that when the charter of a turnpike company authorized its construction on a route including a public county bridge, and required the payment of damages to the owners of lands over which the road should pass, the compensation clause applied to the bridge as included in the term "lands," of which the county was the owner. Indiana Cent. R. Co. v. State, 3 Ind. 421, merely decided that the construction of a railroad over a part of a tract of eighty acres of land purchased by the state for the purposes of an institution for the deaf and dumb, and on another part of which the buildings for the institution had been erected, would not so materially interfere with the purposes of the institution as to justify the enjoining the company from crossing the lands with its railway. All the cases it will be seen are entirely consistent with the conclusion to which we have come, that the state has not delegated to railroad corporations the right to take property held in trust for public use, except to the limited extent specified in the statute, and that their right to take lands held in trust to be used as a public park or common is not within the statutory grant.

This leads to a reversal of the order and a denial of the application.

All concur.

Order reversed, and ordered accordingly.

Measure of damages. Market value. Probable profits. Cost of improvements on land Form of instructions to jury of inquest.

JACKSONVILLE & SOUTHEASTERN RAILWAY CO. v. WALSH.

(106 Ill. 253, 14 American & English Railroad Cases, 245.).

Supreme Court of Illinois. March 29, 1893.

Appeal from circuit court, Morgan county; Cyrus Epler, Judge.

Morrison, Whitlock & Lippincott, for appellant. W. H. Barnes, Geo. W. Smith, and Oscar A. De Leuw, for appellee.

WALKER, J. This was a proceeding under the eminent domain act, to condemn land for railroad purposes. The petition was filed and presented to the circuit judge, and he fixed the time for hearing on the 12th of August, 1882. On the day thus fixed appellee appeared and filed an answer, denying all the material allegations of the petition. A jury was impaneled, and, at the instance of appellee, they went upon and examined the premises sought to be condemned, before the admission of any evidence. The evidence was heard by the jury, and they found and reported $14,000 as the damages appellee would sustain by taking the property for a depot for the road. Appellant thereupon entered a motion for a new trial, but it was overruled by the judge, and a final order entered on the finding of the jury. The railroad company thereupon prayed and perfected an appeal, and the record is brought to this court, and various errors are assigned.

There can be no plainer proposition than the cash value of the property condemned was the sum appellee was entitled to recover as damages. All legitimate evidence tending to establish that sum was proper, and all evidence that tended to enhance the damages above or reduce them below that sum was illegitimate and improper. The inquiry should have been confined to the market value of the property, and all evidence of the amount of business that was or could be done in it, or the probable profits arising therefrom, was improper, and should have been rejected. The purposes for which it was used and designed, its location and advantages as to situation, were proper matters of consideration by the jury; but the profits of the business of the past, and conjectural profits for the future, were too speculative and uncertain upon which to ascertain the market or cash value of the property. The question was, not the value of the property for a short term of years, but the entire property, and its value. Here, evidence was admitted to show the sales of liquor in the saloon each day, and the profits accruing from these sales. Such sales depend so largely on varying circumstances that the damages are purely speculative. Whether there shall be licenses granted to keep saloons in the municipality is contingent, and wholly uncertain. No one can say that, when appellee's license expires, he or others can procure another for years, if ever, afterwards. That all depends upon the discretion of the municipal authorities. Again, one person can do a greatly larger business in the same calling, at the same place, and under the same circumstances, than another. It may be that appellee could, in that saloon, do double the amount of business that any other person could do. Such considerations are purely contingent, and altogether speculative, and cannot form the basis for fixing the price of property, and its market value was the question involved, and which the jury were required to find. That was the measure of the damages they were to assess.

The question as to the number of guests that stopped at the house daily, was of the same character. That depended upon a great number of contingencies. As one witness answered, the house was sometimes full, and sometimes it was not. Again, the question of the cost of erecting such buildings was not an element of damages, unless it were shown they would actually increase the value of the premises to the extent of their cost. All know that the cost of improvements on real estate is not a true test of their value in market. They may, or not, owing to the circumstances, enhance the value of the property to the amount of their cost. The true question was, what was the value of the property as it then was,—not what it cost, but for how much would it sell? The admission of this evidence, against the objection of appellant, was also error.

It is urged that the court erred in giving appellee's sixth instruction. It singles out and calls attention to the testimony of appellee, in finding their verdict. Such a practice has long been condemned, in numerous cases in this court, as unfair, and calculated to magnify the importance of the evidence of the particular witness. Here there were many witnesses as to the value of the property, and great contrariety of opinion as to its value, and the jury might well ask why the judge should refer to the evidence of this particular witness, unless it was regarded as more reliable than that of all others. Even his own witnesses did not all agree with him as to value. Then why single out and refer to his evidence above all others, and this, too, when he was a deeply interested witness? Why should the court thus indorse his evidence? We must in this case, as we have in many previous cases, hold this instruction erroneous, and, in the conflict of the evidence, ground for a reversal.

For the errors indicated the judgment of the court below must be reversed and the case remanded. Judgment reversed.

Injunction. Grade crossing of an existing railroad. Parallel railroads. Remedy at law.

EAST ST. LOUIS CONNECTING RAILWAY CO. v. EAST ST. LOUIS UNION RAILWAY CO.

(108 Ill. 265, 17 American & English Railroad Cases, 163.)

Supreme Court of Illinois. Oct. 1, 1883.

Appeal from circuit court, St. Clair county; Amos Watts, Judge.

Bill for an injunction by the East St. Louis Connecting Railway Company against the East St. Louis Union Railway Company to restrain the latter from proceeding with certain condemnation proceedings, and from making certain crossings over complainant's tracks. There was a decree dissolving a temporary injunction and dismissing the bill. Complainant appeals. Affirmed.

R. A. Halbert, for appellant. G. & G. A. Koerner, for appellee.

SCHOLFIELD, J. The purpose for the incorporation of the appellant and appellee is the same,—that of the transferring cars from one railroad to another, from the several railroads to the stock yards, and to the elevators, mills, warehouses, and ferries accessible, and from these back again to the several railroads. They are incorporated under the same general law, and both have the requisite municipal authority for laying their tracks in the street. The main track of appellee does not cross that of appellant, but it lies within a few feet of it, and extends parallel with it, and crosses some of appellant's lateral tracks and switches, etc., and some of the lateral tracks and switches which it will be necessary for appellee to construct and operate will cross the main track of appellant, and, perhaps, also, some of its lateral tracks and switches. No continuous portion of appellant's main track is taken and sought to be condemned, but crossings of and for lateral tracks and switches are alone the subject of the taking and the condemnation prayed to be enjoined.

The evidence, when fairly considered, fails to sustain the allegation in the bill that the construction and operation of appellee's railway over the lateral tracks of appellant, as proposed in the proceedings for condemnation, will render it impracticable for appellant to carry on its business and exercise its rights and franchises as a railroad corporation, and be a substantial destruction of its property and franchise. It does, however, show that appellant will be seriously hindered in the operations of its tracks, switches, etc., by the operation of appellee's tracks and switches at the same time, and that this will greatly detract from the profits of its business, and depreciate the value of its property. In principle the case is simply one wherein one competing road is delayed in the movement of its trains by stoppages rendered necessary by crossing the tracks and switches of another, when no grant involving a contract not to be thus delayed exists, and no priority of right in that regard is otherwise shown. The mere grant of the right to build a railroad between given termini creates no implied obligation by the state to not thereafter grant the right to build other railroads parallel with it between the same termini. Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 420; Hudson & D. Canal Co. v. New York & E. R. Co., 9 Paige, 323; Illinois & M. Canal v. Chicago & R. I. R. Co., 14 Ill. 314. Nor does it imply an obligation on behalf of the state that other railroads, with their tracks and switches, shall not thereafter be granted the right to cross the state in a different direction, and thus pass over its tracks and switches. Chicago & A. R. Co. v. Joliet, L. & A. Ry. Co., 105 Ill. 388. The public welfare especially requires that the business of carrying shall be open to competition as far as possible, and no monopoly in that regard, however limited the sphere of its operation, can be presumed to have been intended by the legislature in the enactment of the general law for the formation of railroad corporations. When appellant organized as a corporation, and built its road, it was charged with the knowledge that other companies had the right thereafter to organize and build and operate their roads, precisely as appellee has organized and is seeking to build its road. The probability was within reasonable contemplation, and appellant's stockholders acted with their eyes open, and took their chances of this kind of competition.

In Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co., 97 Ill. 506, where a crossing by one railroad over the switches of another was sought to be enforced, at page 523, in speaking of the statute under which these companies organized, and the general law in relation to eminent domain, it was said: "It seems plain, taking these two statutes together, that the general assembly intended to leave not only the question of whether the taking of any given property for any given purpose named in the railroad act would be of such public use as to warrant the taking thereof, upon just compensation, without the consent of the owner, to be solved by all-pervading laws of trade and commerce, but also to leave the question of the place and manner of such taking to be controlled upon the same principles. They are both left to the determination of the railroad company seeking the same, under the limitation that full compensation therefor must be made by such corporation. The legislative declaration assumes that no such corporation can afford to incur the necessary cost in this regard for a work that will not prove profitable, and hence not needed for public use, or to thus take for such work property not needed therefor, especially as property rights so acquired, though fully paid for, cannot be made available for any other purpose without forfeiture of all title to the same. The security against a wanton and arbitrary exercise of

this power upon mere whim or caprice, and that in all cases the point and manner of taking the land selected will be that least injurious to the owner, and yet suited to the public necessity, is found in the fact that such corporations will be induced, by considerations of their own best interest to select, in making such crossings, that practical place and that practical mode which will be the least detrimental to the owner, because the corporation so selecting is required by law to make to the owner full compensation, and the more injurious to the owner the place selected and the mode chosen, the greater will be the amount of necessary compensation to be paid."

Counsel for appellant, with seeming confidence, relies upon the decision in Central City Horse Ry. Co. v. Ft. Clark Horse Ry. Co., 81 Ill. 523, and to some of the language used by the judge in argument in delivering the opinion of the court in Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co., supra. In the first-named case, one horse railway company was seeking to appropriate and condemn the central part of the track and fixtures, or substantially that, of a rival horse railway company leaving the ends unaffected, and it was held this was a substantial destruction of the railway, and could not, therefore, be tolerated. But we have seen, here, there is not appropriation of, or offer to condemn, any continuous part of appellant's main track, but the purpose is merely to take and condemn crossings of and for lateral tracks and switches,—the very thing that was held allowable in the last-named case. The language in the opinion in the last-named case, to which reference is made, is this: "To warrant the taking of the property of one party already appropriated to a public use, and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use be a different use, and also that the change from the present use to the new use shall be for the benefit of the public." This was merely introductory to the main discussion, and, as is therein shown, not vital to the question at issue. Still, regarding it as an authoritative enunciation of a legal principle, it is just as obvious, here as it was there, that the use of a railroad track for the mere purpose of crossing it is not the same as the use of it for the transportation of trains from one point to another along its line. This use takes no property from one party to give another, but gives the one simply a limited easement in the property of the other, to be enjoyed in conjunction with the equal right of user of the other.

We see no cause to disturb the decree below. Legal damages, assessed as provided by law, will afford appellant an adequate remedy for all it will suffer by the acts of appellee. There is no ground for an injunction. The decree is affirmed. Decree affirmed.

Entry without right. Subsequent condemnation proceedings. Laches. Measure of damages. Time of taking.

JONES v. NEW ORLEANS & SELMA R. R. CO.

(70 Ala. 227, 14 American & English Railroad Cases, 217.)

Supreme Court of Alabama. Dec. Term, 1881.

Appeal from city court of Selma; Jona Haralson, Judge.

White, Craig & White, for appellant. Brooks & Roy, for appellee.

BRICKELL, C. J. This was a proceeding instituted by the appellee, a corporation created under the laws of this state, having authority to construct and maintain a railroad from New Orleans to Selma to ascertain the compensation to be paid the appellant, for lands of which she was the owner, which had been taken and appropriated in the construction of the road. The appellee entered and constructed its road on the lands in 1870, and has since continued in the use thereof. The several assignments of error, relating exclusively to the rejection of evidence, raise but a single question, as is recognized by counsel, whether the appellant was entitled to the value of the lands as of the day when the proceeding was instituted (May 4, 1880), enhanced by the value of the rails, ties, trestles, and other structures, placed thereon by the appellee.

It is not denied that the appellee was clothed with power to acquire the land for the purpose of constructing a railroad, by agreement with the owner, or, in the absence of agreement, by appropriate proceedings for its condemnation. It has long been settled in this state, that the general assembly may confer on corporations, created for the construction of railroads, the right to take lands necessary for the use and maintenance of the road, upon making to the owner just compensation. Aldridge v. Railroad Co., 2 Stew. & P. 199; Davis v. Railroad Co., 4 Stew. & P. 421; Railroad Co. v. Kenney, 39 Ala. 307. Whether it was essential to the validity of a law conferring this right on such a corporation, that it should require payment of the compensation to precede or to be concurrent with the taking and appropriation of the land, or whether all the demands of the constitution were not satisfied, if adequate remedies were provided by which the owner could secure the compensation, was an unsettled question. Aldridge v. Railroad Co., supra; Sadler v. Langham, 34 Ala. 311. The constitution of 1868 (article 13, § 5), required that the compensation should be paid before, or at the time of the taking and appropriation; and a provision similar in substance and effect is incorporated in the present constitution (article 14, § 7; article 1, § 24).

The appellee, having entered upon the lands without the consent of the owner, without instituting the necessary proceedings for the ascertainment of the compensation to which the owner was entitled, and its actual payment in money, as required by the constitution, was a trespasser. The owner could have supported an action of trespass against it, or an action of ejectment, and could have enjoined it by a bill in equity from the construction of its road, until the compensation was ascertained and paid. Pierce, R. R. 166, 167; Railroad Co. v. Jones (at last term) 68 Ala. 48.

It is, as insisted by the counsel for the appellant, a maxim of the common law, that everything affixed to lands becomes a part of the freehold, subject to all its incidents and properties, and can not be dissevered, or converted into personal property, without the act or consent of the proprietor of the lands. The maxim was never inflexible in its operation, and, as far back as it may be traced, was subject to exceptions. Van Ness v. Pacard, 2 Pet. 137; Railroad Co. v. Canton, 30 Md. 347. These exceptions have multiplied with the increase in the importance and value of personal property, and the varied necessities and exigencies of society. It is, nevertheless, true generally, that if there is a tortious entry upon lands, and the tortfeasor makes improvements upon them, annexed to the soil, for the better use and enjoyment of the lands, such improvements become a part of the realty; all property in them is vested in the proprietor of the soil, who is under no legal or equitable obligation to make compensation for them, or to suffer them dissevered and removed. 2 Kent, Comm. 338. It was the fraud, or the folly of the tortfeasor to build, to plant, or to sow, on the lands of another, without his consent. Amos & F. Fixt. 10.

This maxim seems to us incapable of any just application to parties standing in the relation of these parties, or to a proceeding of this character; and it must not be overlooked that they have corresponding rights and remedies. In this relation they are placed by law. The rights of each party, the law distinctly defines; and the remedies each must pursue, to secure and enforce their rights, are clearly prescribed. It was the right of the appellee to acquire the lands for the use of the road,—a *public* not a *private* use. Appropriate proceedings for its acquisition, if from any cause it could not be acquired by contract with the owner, the law prescribes. Just compensation for the land at the time of its taking, paid before or concurrently with its appropriation, was the right of the appellant. If there was an entry upon, and appropriation of the lands, without the consent of the owner, and without having the compensation ascertained, and making payment of it, there were remedies to which he could have resorted, protecting himself, regaining his possession, and compelling the ascertainment and payment of the compensation. If he is negligent,—if he stands by in silence, suffering the wrongful entry, or continuance of possession under it, the construction of costly improvements, not nec-

essary to the enjoyment of the freehold, inconvenient to his use and occupation, valuable to him only because he may dissever them, converting them again into personal property, and valuable only to the party making them for the uses to which they are dedicated,—there is but little of equity in a claim that the measure of his compensation shall be increased by the value of the improvements, or that the time at which such compensation is to be estimated shall be varied. "Nemo debet locupletari ex alterius incommodo" is a maxim of the common law, of as much force, though it may not be of as general application, as the maxim, "Quicquid plantatur solo, solo cedit."

The duty rested upon the appellee, before the taking and appropriation of the lands, to have caused, in the appointed mode, an ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation. Neglecting this duty, the entry upon and possession of the lands was wrongful, no title to them was acquired, and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession, does not preclude the appellee from resorting subsequently to the appropriate proceedings for the acquisition of the lands, and, of consequence, availing itself of all the structures it may have placed thereon. Justice v. Railroad Co., 87 Pa. St. 28; Secombe v. Railroad Co., 23 Wall. 108. Though the appellee was a trespasser, by reason of the neglect to pursue the proper remedy for acquiring the lands, acquiring them without the consent of the owner, there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and by which title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser, the proprietor can keep the lands, and, keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser, by which he may acquire the use and enjoyment of, or title to the lands. There is, also, another distinguishing fact. The structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses, which are the consideration for the grant to the appellee of corporate franchises, and of the right, in the exercise of these franchises, to take and appropriate private property. Justice v. Railroad Co., supra; Railroad Co. v. Canton, supra; Morgan v. Railroad Co., 39 Mich. 575; Lyon v. Railroad Co., 42 Wis. 538. These elements of the case distinguish it from that of the trespasser entering upon lands, fixing chattels to the freehold for its use and enjoyment, which he must intend to convert into realty, and which, following the title to the soil, as one of its incidents, pass to the proprietor.

In this proceeding, it is only just compensation which may be awarded to the owner of the lands. This includes not only the value of the land which may be taken, but the injury resulting to the remaining lands of the proprietor. Railroad Co. v. Burkett, 42 Ala. 83. If these, in consequence of the taking, are lessened in value, the diminution is a part of the loss of the injury, the proprietor has sustained. Cooley, Const. Lim. 705–712. "The question in these cases," says Judge Cooley, "relates, first, to the value of the lands appropriated; which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the condition in which he sees fit to leave it. Second, if less than the whole estate is taken, then there is further to be considered, how much the portion not taken is increased or diminished in value in consequence of the appropriation." Fair, reasonable, adequate, just compensation for the loss and injury he may sustain, the constitution guaranties to the citizen whose property is taken for public uses. When this is afforded, the purposes of right, and of the constitution, are satisfied. It is not intended that compensation shall extend beyond the loss and injury, including that which the land-owner had not when the property was taken, but which is an incident of the appropriation, and essential to the uses for which the law confers the right of taking the property. Justice v. Railroad Co., supra; Railroad Co. v. Canton, supra; Lyon v. Railroad Co., supra; Morgan v. Railroad Co., supra; Railroad Co. v. Booream, 28 N. J. Eq. 450.

The compensation is assessed, or ascertained, as of the time when the land is taken. Until the taking, whatever may be the other rights of the proprietor, the right to just compensation is not complete. What shall constitute the taking, may vary in different jurisdictions, and may depend, when proceedings for condemnation are resorted to, before an actual appropriation of the land, upon the stage of the proceedings. Where, as in this case, such proceedings are not resorted to, the entry upon the lands, disturbing the possession of the proprietor, followed by the location of the road, and operations for its construction, is the time of taking. These are acts in the exercise of the right of eminent domain, and the right of the proprietor to compensation for the loss and injury sustained by the exercise of the right is then complete. Pierce, R. R. 209. It is obvious, no other period of time can be adopted, without injustice to the landowner, or to the corporation taking the land. If the period of condemnation, or of the commencement of proceedings for condemnation, in a case like the present, was adopted, the consequence would be, that the landowner could not claim damages compensatory of the injury to his contiguous lands. Their value as of either period, after it has been diminished by the construction of the road, the market value, would be the measure of the compensation to

which he would be entitled. Past injuries to them could not, in this proceeding, be considered. It is not a remedy for the recovery of damages for such injuries. Morgan v. Railroad, supra. In Railroad v. Booream, supra, it is said by the court of appeals of New Jersey: "Suppose the land was valuable for building, or farming purposes, and, by reason of cuts and embankments made by the company, it was rendered intrinsically worthless; it would be unjust to compel the owner to accept as compensation its intrinsic value in that condition. That result would necessarily be reached, if the valuation of the land was, under such circumstances, to be made as of the time when the condemnation was effected."

The value of the land when taken, before the construction of the road, and before any injury to the land taken resulting from construction, and the injury, the diminution in value of the contiguous lands, is the true and just measure of compensation. Lyon v. Railroad Co., supra. Delays in condemnation may occur, from many causes, and may result from the mere negligence of the corporation. The landowner can always quicken it into diligence, and prevent any other loss or injury, than that for which compensation must be paid. Such delays, it may be, would often find encouragement, if the period of condemnation was fixed as the time of assessing the compensation, when by the taking the value of the land may have been, if not destroyed, materially reduced. On the other hand, the delay of the landowner to compel compensation would be encouraged, if he could claim that it should include the value of the structures which have been erected on the lands. In neither claim is there right or justice, and neither comes within the letter or spirit of just compensation, which the constitution requires shall be made before or concurrently with the taking of the land. The landowner is entitled to the value of the lands at the time of the taking and appropriation, whether the damages are assessed, as they should be, by condemnation proceedings, before the entry for the purposes of constructing the road, or subsequently, after there has been an actual taking and appropriation, without such proceedings, and without making payment of compensation. So, he is entitled, as of the same time, to the injury to his contiguous lands. It is this measure of compensation the constitution requires shall be paid before or concurrently with the taking. Interest upon these sums should generally, in a case like the present, be computed. The liability for interest is not now presented, and it may be that there are circumstances connected with this case which would render the payment of interest inequitable. More than this measure of compensation the landowner is not entitled to receive. When it is paid, the land, with all the structures thereon placed, will pass to the appellee.

There is no error in the rulings of the city court, and the judgment is affirmed.

Diverting water course. Freshets. Ice. Measure of duty.

BELLINGER v. NEW YORK CENTRAL RAILROAD.

(23 N. Y. 42.)

Court of Appeals of New York. March, 1861.

Action to recover damages to plaintiff's land caused by obstructing a stream. There was a judgment for plaintiff. Defendant appeals. Reversed.

Sidney T. Fairchild, for appellant. Robert Earl, for respondent.

DENIO, J. The defendants had a right to construct their railroad across the creek and the low lands on each side of its channel, at the place where it was built; but they were bound to do this with all necessary care and skill, so as to save the adjacent proprietors from any injurious consequences which might arise on account of the necessary modification of the natural surface of the ground, so far as should be reasonably practicable. This was the substance of the charge of the judge. He told the jury that the company was not bound to guard against every possible contingency, but that they were bound to see that the openings were sufficient for any freshet that might reasonably be expected to occur in the stream. In this, I think, he stated the rule with substantial accuracy; though I am of opinion that the principles of the action were not as fully explained as was desirable. But no request to supply the deficiency was made by the defendant's counsel. The exceptions to the charge cannot be sustained.

I am of opinion, though not without some hesitation, that there was evidence enough to submit the case to the jury upon the question whether the road and its embankments and bridges were constructed with suitable care and skill. There was no evidence directly bearing upon the point, by any witnesses of competent knowledge and experience. But the fact that, on three several occasions between the time of the construction of the road, in 1835, to the trial, in 1856, the water and ice had been forced out of the stream upon the plaintiff's land, and that, in the judgment of witnesses who had seen the breaking up of the ice, the diversion of the flood from its natural course on the west side, where it would have been harmless, to the creek and onto the land on the other side, was caused by the embankment, and the want of sufficient apertures for the passage of the water, afforded some evidence that the structures referred to were faulty. When the character of the stream, the peculiar suddenness and violence of the freshets which caused the injury, and their infrequency, are taken into consideration, it is evident that the plaintiff's case was not a strong one: but I think it was one to be determined by the jury. I am, therefore, in favor of sustaining the ruling of the court in denying the motion for a nonsuit.

But the judge refused to allow the inquiry to be made of a witness, who was an engineer by profession, and who was familiar with the locality and with the defendant's structures, whether the embankment and the bridges were carefully and skillfully constructed with reference to the creek. It does not appear upon what ground the question was rejected by the justice who presided at the trial. But the opinion of the court, given at the general term, upon the appeal there, puts the right to recover upon the sole question whether the propulsion of the ice and water upon the plaintiff's land, during the freshets referred to, was occasioned by the erection of the defendant's structures. If this is the true question, the inquiry made of the engineer, Gilbert, was immaterial; for, whatever skill and judgment may have been applied to the construction of the road, and though no fault whatever was imputable to the defendants or their servants, they were still, upon this doctrine, responsible for the damages, provided they would not have arisen if the railroad had not been constructed. This, as we have seen, was not the theory upon which the case was given to the jury at the circuit; and hence the opinion of the general term consistently declares that the charge was more favorable to the defendants than the law would warrant. The general term proceed to state, in effect, that the defendants, though authorized by law to construct the road on the course on which it is located, are still liable for any interference with the water, either that which would ordinarily flow in the stream, or that which is superinduced by a freshet, to the prejudice of a third person, to the same extent that a private individual would be liable for similar acts upon his own land. If this be a correct statement of the law, the question of negligence, or want of due skill and judgment, in the construction of the road, was not in the case; for I suppose that the maxim, "aqua currit et debet currere," absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretense, and subjects him to damages at the suit of any party injured, without regard to any question of negligence or want of care. If one chooses of his own authority to interfere with a water-course, even upon his own land, he, as a general rule, does it at his peril, as respects other riparian owners above or below. But the rule is different where one acts under the authority of law. There he has the sanction of the state for what he does, and, unless he commits a fault in the manner of doing it, he is completely justified. This is, of course, to be understood as limited to cases in which the legislature has the constitutional power to act. If, therefore, a corporation or an officer should be authorized by a statute to take the property of individuals for any purpose, however public or generally beneficial, without compensation, or, for a private use, making compensation, the pretended authority

would be wholly void, and, of course, could afford no protection to any one. But this limitation has no application to cases where property is not taken, but only subjected to damages, consequential upon some act done by the state or pursuant to its authority. Some doubt at one time existed as to this distinction; but the question was directly presented in Radcliff v. Mayor, etc., 4 N. Y. 195; and it was there determined, by the unanimous judgment of the court, that, where persons are authorized by the legislature to perform acts in which the public are interested, such as grading, leveling and improving streets and highways and the like, and they act with proper care and prudence, they are not answerable for the consequential damages which may be sustained by those who own lands bounded by the street or highway. The doctrine is equally applicable to the construction of a railroad by a private corporation, for the enterprise is considered a public one, and the authority is conferred for the public benefit. It is on this account that such corporations are authorized to exercise the right of eminent domain, which could not be conferred in respect to any other than a public undertaking. Bloodgood v. Railroad Co., 18 Wend. 9; Davis v. Mayor, etc., 14 N. Y. 523.

A number of cases are referred to in the opinion of the general term, as tending to establish the doctrine that the defendants are liable for all damages consequent upon the erection of their works, irrespective of the question of negligence or want of care and skill in constructing them. Considering the point to have been conclusively adjudged in the case of Radcliff v. Mayor, etc., I might leave the point to stand upon that precedent; but I think it may readily be shown that there is no well-considered case having a contrary tendency. In Boughton v. Carter, 18 Johns. 405, the action was for interrupting the flow of the water along a turnpike road and the ditch belonging to it, so that it was turned into the plaintiff's garden and destroyed his vegetables. Defense, that the defendant was engaged in repairing the turnpike road under the authority of the company. There was a judgment for the plaintiff, which was sustained by the supreme court. The judges say that the question before the jury was, whether the bar across the road had been properly constructed, and whether the damage done to the plaintiff's garden might not, with reasonable care and diligence, have been avoided. They declared that it was a case in which the defendants could guard against the injurious consequences, and that it was their duty to do so. "If," they added, "they will not take this reasonable care, and the property of individuals is damaged by their unskillfulness or negligence, they are responsible." The case was one of small moment, and arose in a justice's court, and was not elaborately treated; but it does not aid the plaintiff, for it is clear that the ground of liability was considered to be that which I have stated.

The case of Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463, was an action for negligently constructing a culvert under one of the streets of the city, by means of which (on account of the deficient capacity of the passage-way for the water) its flow in a freshet was obstructed, and it was set back upon the plaintiff's manufactory, to his injury. A recovery by the plaintiff was sustained. The action, it will be perceived, sounded in negligence, and the opinion of the court proceeded wholly on the ground that the charge had been established; the main suggestion of the court being that the city had not shown that it employed a competent engineer to construct the culvert. No idea appears to have been entertained that the defendants were responsible for the mere fact of setting back the water, irrespective of the question of negligence. If that were the law, the whole discussion in the case would have been without an object. A late case in the court of queen's bench has been insisted upon, as determining the precise question against the present defendants. The declaration charged the defendants in that case with erecting an embankment across certain low lands in the valley of the river Dun, "without having or leaving sufficient arches or water-way to allow the flood waters to escape," whereby they were penned back and finally forced upon the plaintiff's land to his injury. The plaintiff had a verdict, and, on the argument of a rule to show cause, two questions were discussed and determined. The first was, whether the owner of the land, under whom the plaintiff claimed as lessee, had not been already compensated for these damages by the award of an arbitrator. The company had purchased a parcel of the land of this proprietor for the track of its road, the price of which was, by agreement, to be determined by an arbitrator, and the submission provided that he should, in addition to the compensation for the land, include all damages done to the remaining estate of the vendor, "occasioned by severance or otherwise, which could have been awarded by a jury, in case the value of such land and compensation for damages had been settled by the verdict of a jury." The arbitrator awarded a gross sum for the value of the land, including the damages mentioned, which was paid; and the defendant insisted that this embraced the damages for which the suit was brought. The court held otherwise, and decided that it only included the damages which were capable of being ascertained and estimated at the time compensation was awarded, and did not reach the damages in question, which, it was said, could neither be foreseen nor even guessed at by the arbitrator. The second question was, whether the defendants were liable, since they had built the road according to the provisions of

the act of parliament authorizing its construction. The act obliged the company to make openings for flood waters in one part of the route, in another county, but was silent as to such openings at the place in question. Hence the defendants insisted, upon the principle "expressio unius est exclusio alterius," that they were not bound to make flood gates at that place. Upon that point, the court said the company might have been at liberty, under the act, to construct their railway across the low lands in the manner they had done; but that it did not follow that, in case an unforeseen injury should arise to any one from the mode in which it was constructed, they are not liable to the action. They added that the company might, by proper caution, have avoided the injury which the plaintiff had sustained; "and we think," the opinion concludes, "that the want of such caution was sufficient to sustain the action." Lawrence v. Railway Co., 16 Adol. & E. (N. S.) 643. The case does not, I think, afford any countenance to the idea that the defendants are liable at all events for an injury occasioned by their embankment. They are to use all reasonable caution; but, exercising such caution, they had a right to construct the road, and were not liable for any consequential damages to any one whose property they did not directly invade. The defendants in the case cited contended for impunity, though they had not used due caution, under the peculiar terms of their act. What the present plaintiff contends for is, that the utmost care and skill in constructing the works will not avail the defendants, if, after all, an injury has happened in consequence of the existence of the work, though they had the authority of an act of the legislature to construct it.

An obstruction may be such that any one, whether professional or not, would see at a glance that it was improper and lacked safeguards necessary to be made, and which might effectually prevent injury. Such seems to have been the case just mentioned. There was but a single culvert in the embankment, and the injury was done during a high flood occurring the same year in which the lands were appraised. In this case there was an opening of considerable width, besides the bridge over the creek, for the passage of floods. It does not appear that it had ever proved insufficient except when a high flood was complicated by the breaking up of the ice, and that occurred only thrice in twenty years, and the same thing appears to have happened once at least before the embankment was constructed; and, on one of the occasions after the building of the road, the freshet was destructive to most of the bridges on the creek. In my opinion the passage of the creek and valley by the railroad called for the exercise of engineering skill and judgment of a high order. The character of the creek and its habits (if that expression may be used) should have been investigated, and especially its liability to be broken up by a thaw in the winter, when covered with thick ice. It is possible that any embankment across the valley, even when furnished with the full amount of openings which could be left consistently with laying a rail track, would modify, to some extent, the action of the water upon the ice in the case of a winter flood. While I have been engaged in examining the case, the streams in the vicinity of this road have been opened by a spring flood, and the track has been covered for a considerable distance by ice and debris, so that the trains have been stopped for a considerable time. Whether it was practically possible to have fixed the grade so that this would not have happened, can only be determined by the judgment of men skilled in such matters. The defendants, as the judge at the trial very properly said, were not insurers. But they were authorized to build the railroad at the place where they did build it; and if, necessarily and in spite of all reasonable safeguards and precautions in constructing the work, occasional disturbance to adjoining lands would arise from a winter freshet, it was the misfortune of the plaintiff that he had lands exposed to such occurrences.

There are two other cases mentioned in the opinion of the general term, namely, Fletcher v. Railroad Co., 25 Wend. 462, and Brown v. Railroad Co., 12 N. Y. 486. The first of these cases is substantially overruled in the one referred to in 4 N. Y. 195. In the other case the only question presented was whether a party continuing a nuisance was liable if he had not had notice to remove it. The concluding sentence in the last opinion given in that case was written when the writer had not in his mind the case in which Fletcher v. Railroad Co. was reconsidered; but no part of that opinion was adopted by the court. The case itself raised no question material to the present inquiry; and it cannot, therefore, be considered a precedent in the case under consideration.

I am of opinion that the judgment should be reversed, on account of the erroneous ruling upon the question of evidence.

Judgment reversed and new trial ordered.

HOYT, J., dissented.

See, as to damage from closing highway, Cullen v. New York, New Haven & Hartford R. R. Co. (1895) 66 Conn. 211, 33 Atl. 910.

Obstructing access to adjoining land. Extent of public right in highway.

KELLINGER v. FORTY-SECOND STREET & GRAND STREET FERRY R. R. CO.

(50 N. Y. 206.)

Court of Appeals of New York. Nov. 12, 1872.

Action to restrain a street-railway company from using and occupying a public street, and for damages caused thereby. There was judgment for defendant on demurrer. Plaintiff appealed. Affirmed.

Edward Mackinley, for appellant. Moses Ely, for respondent.

CHURCH, C. J. It is not alleged in the complaint that the plaintiff owns the fee of the street in front of his premises, nor that the track of the defendant's road was unnecessarily or negligently or willfully laid so near the sidewalk as to impair the use of his premises and depreciate its rental value.

We cannot take judicial notice of the width of the street at that point, nor but that the track of the road was laid in the only available space vacant for that purpose. Nor is it alleged that the grade of the street has been changed or that there is any physical obstruction to free access to the plaintiff's premises, nor any practical difficulty in passing over the track. The gravamen of the action is that the defendant has laid the track of its road so near the sidewalk as not to leave sufficient space for a vehicle to stand, and that the plaintiff and his family are thereby incommoded in leaving and returning to their residence, and that the rental value of said premises is greatly depreciated. The action is based upon the idea that the easement in the street which the plaintiff is entitled to has been and is being interfered with, and that he is entitled to compensation for the injury occasioned by such interference and an injunction to restrain the defendant from using their railroad. The corporation of the city of New York has acquired by grant, dedication or confiscation the title in fee to the land on which the streets are laid, but the title thus vested is held not as private property but in trust for public use, and such as was acquired under the act of 1813 is by that act expressly declared to be held in trust for the purpose of maintaining public streets. In People v. Kerr, 27 N. Y. 188, this court held that the trust of the city was publici juris, held not for the benefit of the people of the city alone, but for the people of the whole state, as the agent of the state and a part of its governmental machinery, and that consequently the absolute control and direction of the trust was in the legislature as the superior power; that legislative authority to construct a railroad on the surface of the streets without a change of grade was a legitimate exercise of the power of regulating public rights for public uses, and that the city was not entitled to compensation, because it had as a corporation no property which was appropriated.

It is not quite clear as to what was intended to be decided relative to the rights of abutting owners. The opinion of Wright, J., which the case states was acquiesced in by a majority of the judges, affirms explicitly that such owners had no property, estate or interest in the land forming the bed of the streets in front of their respective premises, to be protected by the constitutional limitation upon the right of eminent domain; that they had no reversionary right, and even if they had, it was only a possibility so limited as to be subsequent in enjoyment to a prior present ownership that might last forever, and was not property entitled to protection from appropriation by the will of the government, and that if it was, it had no appreciable value. Two of the judges queried whether such owners might not have some interest independent of the rights which the public had acquired to have free access to their premises, but thought that no such question was involved in the case.

We should feel bound to adhere to this decision and its necessary legal results, even if we doubted its soundness, because large sums of money have been expended upon the faith of it, and in many obvious ways it has become a rule of property which should never be abrogated except for the most cogent reasons. It is however strenuously insisted by the plaintiff that the decision does not reach the point involved in this case, but I am unable to see why it does not. It clearly holds that the abutting owners had no property in the street which was taken for the railroad, for which they were entitled to compensation, and in this respect the case is distinguishable from Williams v. Railroad Co., 16 N. Y. 97; Craig v. Railroad Co., 39 N. Y. 404, and other kindred cases which hold that the laying of a railroad in a street or highway is an additional burden to the easement, which as against the owners in fee the public had previously acquired, and for which such owners were entitled to compensation. These decisions have no application when the fee as well as the easement is vested in the public. This distinction is expressly recognized in these cases. In the former Selden, J., said: "No case is likely to arise in the city of New York which would be entitled to any weight in the decision of this question, for the reason that it is claimed, and apparently with much justice, that as to a large portion of the streets in that city the fee of land, and not mere easement, is vested in the corporation." The railroad of the defendant is not therefore a public nuisance. It was authorized by the sovereign power of the government. If it had been a public nuisance, the adjoining proprietor being specially incommoded and injured could maintain an action. 6 Barb. 313; 37 Barb. 357, and cases there cited. The basis of his action would have been that he suffered a peculiar inconvenience not common to all the inhabitants of the state, resulting from the public wrong of obstructing the street. In this case the foundation of such

an action is wanting, viz., the unlawfulness of the act. It was authorized by law, and adjudged by this court to be for public use, and within the uses to which the streets may be devoted. The fee being in the public, the legislative authority can lawfully consent to modify, regulate or enlarge its use for the benefit of the public. If these positions are sound, the corporeal rights of property of the plaintiff have not been impaired. Neither his property nor any right of property has been taken from or injured, and his injuries are referable to that class of incidental disadvantages to which he is subjected resulting from the lawful exercise of the absolute power of control vested in the state in connection with the title to the fee of the land. This I think necessarily results from the principles determined in People v. Kerr, supra.

The abutting owners have an easement in the street in common with the whole people to pass and repass, and also to have free access to their premises, but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of an action.

There are expressions in some of the opinions apparently favoring the idea that such an action may be maintained. It was said in Drake v. Railroad Co., 7 Barb. 508, that for contingent and consequential injuries, the aggrieved parties are not entitled to compensation as for property taken for public use, but that an action will lie for such injuries. The force of this remark is spent in limiting it to the statement that such injuries are not a taking of property within the meaning of the constitution, without intending to define what injuries might be recovered for by an action, and this view is confirmed by another portion of the same opinion, in which it is said that adjoining owners have no exclusive right in the streets, but that all other citizens, including railroad companies, have equal rights subject to the control of the public authorities. If this is so there is no principle which will sustain an action for incidental injuries growing out of a lawful regulation by the public. When it is determined that a horse railroad is a public use of the street the question is settled that incidental inconveniences must be submitted to. They become merged in the superior interest of the public. The decision in Fletcher v. Railroad Co., 25 Wend. 462, is cited and relied upon by the plaintiff. There the defendants were authorized to build a railroad upon a line to be selected by themselves, and to cross public highways, by restoring them to their original usefulness. In crossing the highway near the plaintiff's premises, they raised an embankment which obstructed free access and otherwise injured his property, and they were rightfully held liable for the damages. The power exercised in that case by the legislature was entirely unlike that exercised here.

In the first place the fee of the highway was assumed to be in the adjoining owner, and the court held that the legislature had not, and could not, without compensation, authorize the injury complained of, and that all that the legislature professed to do was to protect the defendants from prosecution by the public for obstructing the highway, leaving the rights of the plaintiff untouched. The authority was in no sense a regulation of the use of the highway, but a privilege granted free, as against the public only. Similar views are applicable to the case in 26 N. J. Law, 148. These and like cases are reconcilable with People v. Kerr, supra, upon the difference between the extent of the rights and powers of the public authorities possessed and exercised in the different cases, although the expressions of judges may seem to conflict. It is conceded that the authority to lay a railroad in the streets in the city of New York is lawful without compensation or liability to adjoining owners, and yet the laying of such road even in the widest streets may be and often is a disadvantage and injury to the property adjoining the street, rendering it less accessible and desirable and less valuable. If this action can be maintained I see no reason why in all cases of inconvenience and injury a similar action might not lie. The principle would be the same, and the injury would be only a question of degree. Such a result would not only overthrow previous adjudications, but would unsettle rights of property to an incalculable amount, and inflict serious injury upon the public. But while we feel bound to hold that this action cannot be maintained upon the allegations contained in the complaint, we do not intend to determine that there are no circumstances which will justify an action. All the authorities concur that an injury to private rights or property, committed through negligence or willful misconduct, even though in the pursuit of a lawful purpose, may be redressed by an action.

We are not called upon to determine what acts would amount to negligence so as to give a cause of action. That question is not before us.

The judgment in this case must be affirmed, with leave to the plaintiff to amend the complaint, on payment of costs.

All concur.

See, as to crossing of steam road by electric road, Bridgeport Traction Co. v. New York, New Haven & Hartford R. R. Co. (1895) 66 Conn. 410, 32 Atl. 953.

Elevated railroad. Dedication of streets. Taking property for public use. Fee in highways. Easements appurtenant to land.

STORY v. NEW YORK ELEVATED R. R. CO.

(90 N. Y. 122, 43 Am. Rep. 146.)

Court of Appeals of New York. Oct. 17, 1882.

Action by abutting property owners to restrain the erection of an elevated railway in a public street. There was judgment for defendant. Reversed.

John E. Parsons and Wm. M. Evarts, for appellant. Joseph H. Choate, for property-owners. Julien T. Davies and Roger Foster, for Caso and others. David Dudley Field, for respondent.

DANFORTH, J. The plaintiff is the owner of land situated on the corner of Moore and Front streets in the city of New York, on which he or his grantors erected buildings. To their enjoyment, light, air, and access are indispensable, and are had through Front street. The complaint states that the defendant is about to construct a railroad above the surface of that street in such manner as will obstruct access to the buildings, and deprive the plaintiff of the benefit of light and air. The trial court has in substance found these matters in favor of the plaintiff, and among other things leading to that result, that the defendant intends to construct such road upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside the edge of the sidewalk and carrying girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars intended for this road will when placed thereon have bodies eleven feet high above the tracks, in running will project two feet over the sidewalk on either side of the street, and will reach within nine feet of the plaintiff's buildings. The defendant intends to run its trains as often as once in three minutes, and at a rate of speed as high as eighteen miles an hour.

The learned court found that this construction would "to some extent obscure the light of the abutting premises; that the passing trains will also do this, and give to the light a flickering character objectionable for business purposes," "and to some extent impair the general usefulness of the plaintiff's premises;" "that the line of columns abridges the sidewalk, and interferes with the street as a thoroughfare, where such columns are located;" that the structure "will fill so much of the carriage-way of the street as is more than fifteen feet above the roadway;" "that the fronts of the abutting buildings will be exposed to observation from passengers in the passing trains, and the privacy of those in the second or upper stories of the premises invaded." It is also found that these things will be "of a constant and continuing character," and will "tend to the occasioning of incidental damages to the plaintiff's premises and depreciation of its value;" but also finds the acts of the defendants producing these results would be lawful, and that the plaintiff has no cause of action. This conclusion rests upon the further finding that the mayor, aldermen and commonalty of the city of New York are the owners in fee of Front street, opposite the plaintiff's lots, and that he is not and never has been seized of the same in fee, nor had any estate or interest therein. The complaint was therefore dismissed, and an order made giving to the defendant an extra allowance of costs. From this order and from the judgment of dismissal the plaintiff appealed to the general term, where both judgment and order were affirmed.

Although this statement is somewhat extended, it is evident that the essential facts of the case are within a narrow compass, and it will be found, I think, that the material legal question, however difficult to answer, is simple in its terms, and leads at once to the inquiry whether the scheme of the defendant involves the taking of any property of the plaintiff. If it does, the judgment in its favor is erroneous upon the substantial ground that the intended act, when performed, would violate not only the provision of the constitution, which declares that such property shall not be taken without just compensation (article 1, § 6), but the statutes by which the defendant is bound (Laws 1875, c. 606; Act 1850, c. 140; Act 1866, c. 697; Act 1867, c. 489), or to which they owe their existence (Laws 1867, c. 489; Laws 1875, c. 606), and whose validity would not have been upheld, unless, in the opinion of this court, they provided means to secure such compensation (Railroad Co. v. Kobbe, 70 N. Y. 361; In re New York El. R. Co., Id. 327).

The plaintiff contends first that as the owner of the abutting premises he has the fee of one-half the bed of the street opposite thereto and through which the proposed road is to be built; second, if the fee of the street is in the city, he, as abutting owner, has such right to air and light and access afforded by the street above the roadbed as entitles him to protect it and have it kept open for those uses, until by legal process and upon just compensation that right is taken from him.

In the first place I propose to discuss the second ground as of greater general importance than the other, and equally sufficient if found in the plaintiff's favor to sustain his case. It assumes that the fee of the streets is in the city of New York. The defendant justifies its intended acts through permission of that city. It is not material to inquire in what manner the city acquired its title, for the plaintiff's interest or title, whatever it is, was derived from it. His lots and the street in question are parts of a larger tract, which, prior to May, 1773, the city caused one of its engineers to survey and lay out into streets and lots, and designate upon a map.

By deeds dated respectively in May and in December of that year they conveyed the lots in question to the grantees named there-

in, by metes and bounds. The street already referred to as Front street is marked out upon the map under the name of Water street, and if the description of the premises conveyed does not include its bed—as I am now assuming that it does not—it at least brings it to the street and causes it to adjoin or front upon it. The lots and the street are upon the map, and in the deed are described as being upon the "side of Water" (now Front) street, so many feet and inches, "as by the survey made of this and sundry other lots by Gerard Bancker, one of the city surveyors, dated the 10th day of November, 1772, and filed in the office of the town clerk, will more fully appear, with the appurtenances thereto belonging or appertaining."

The deeds contain a covenant on the part of the grantee "to build and erect" at his own expense certain steets, and among others, the one now in question, "which said several streets" (it declares) "shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are, or lawfully ought to be." The trial court finds that Front street occupies the strip of land which in those grants is mentioned as Water street; that prior to their execution that street was projected across the lots thereby granted and conveyed, and that shortly after their execution, the street referred to was established and made by the grantees. The conveyance to the plaintiff describes the lot in question as "bounded northerly in front by Front street aforesaid," and the trial court finds that upon the same "is erected a warehouse occupying the entire front, and four stories high."

It is not necessary to consider the effect of the circumstances I have now adverted to, upon the rights of the public in the street in question. It is conceded to be a public street. But besides the right of passage, which the grantee, as one of the public, acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. The official survey—its filing in a public office—the conveyance by deed referring to that survey and containing a covenant for the construction of the street and its maintenance, make as to him and the lot purchased a dedication of it to the use for which it was constructed. The value of the lot was enhanced thereby, and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such. For that purpose, no special or express grant was necessary; the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves sufficient. Wyman v. Mayor, 11 Wend. 487; Watertown v. Cowen, 4 Paige, 510. The right thus secured was an incorporeal hereditament; it became at once appurtenant to the lot, and formed "an integral part of the estate" in it. It follows the estate and constitutes a perpetual incumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient tenement. Child v. Chappell, 9 N. Y. 246; Hills v. Miller, 3 Paige, 156; Watertown v. Cowen, 4 Paige, 514.

Nor does it matter that the acts constituting such dedication are those of a municipality. The state even, under similar circumstances, would be bound, and so it was held in Oswego v. Canal Co., 6 N. Y. 257. "In laying out the village plot," say the court, "and in selling the building lots, the state acted as the owner and proprietor of the land; and the effect of the survey and sale in reference to the streets laid down on the map was the same as if the survey and sale had been made by a single individual." Lesser corporations can claim no other immunity, and all are bound upon the principle that to retract the promise implied by such conduct, and upon which the purchaser acted, would disappoint his just expectations. Child v. Chappell, supra.

But what is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface and to its uses the rights of the adjacent lots are subordinate, but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its own grant, and violate the arrangement on the faith of which the lot was purchased. This in effect was an agreement, that if the grantee would buy the lot abutting on the street, he might have the use of light and air over the open space designated as a street. In this case it is found by the trial court, in substance, that the structure proposed by the defendant, and intended for the street opposite the plaintiff's premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse and thus work his injury. In doing this thing the defendant will take his property as much as if it took the tenement itself. Without air and light, it would be of little value. Its profitable management is secured by adjusting it in reference to the right obtained by his grantor over the adjoining property. The elements of light and air are both to be derived from the space over the land, on the surface of which the street is constructed, and which is made servient for that purpose. He therefore has an interest in that

land, and when it is sought to close it, or any part of it, above the surface of the street, so that light is in any measure to his injury prevented, that interest is to be taken, and one whose lot, acquired as this was, is directly dependent upon it for a supply, becomes a party interested and entitled, not only to be heard, but to compensation. The easement is property within the meaning of the constitution and the statutes authorizing the construction of the defendant's road, as well as the warehouse upon the lot, by which it was used and enjoyed, and the owner is, in the language of the act of 1850 (chapter 140, §§ 14, 15, 18), a person having an "estate or interest in real estate, so that if proceedings were instituted to condemn the street for railroad uses he would, as one of those persons, whose estate or interests are to be affected by the proceedings," be entitled to notice of the same (section 14), and compensation (section 16).

So under the act of 1866 (chapter 697), it is supplementary to that of 1850, and embodies its provisions as to compensation, while the act of 1867 (chapter 489), providing for the construction of an experimental line of railway in the counties of New York and Westchester, and under which the road of which the defendant is successor was empowered to act, declared that if in the course of its construction "private vaults or improvements are interfered with or occupied by said construction company, compensation therefor shall be paid by said company to the owner thereof," as in said act afterward provided (section 6), and section 7 provides that any "private property used or acquired shall be compensated for by said company, under provisions of existing laws, authorizing the formation of railroad corporations, and the acquisition of rights of way therefor."

The plaintiff will also be within the terms of the provisions of the act entitled "An act further to provide for the construction and operation of a steam railway or railways in the counties of the state." Laws 1875, c. 606. As therefore it is conceded that his consent to the proposed appropriation of the street has not been given, or compensation made or provided for, or the proceedings above referred to taken, it would seem plain that the cause of action stated in the complaint was made out. And here it will be well to examine the decisions already made by this court in cases arising under the act last cited, viz.: In re New York El. R. Co., 70 N. Y. 327; In re Gilbert El. Ry. Co., Id. 361 (Same v. Handerson.) In these cases the rights of abutting owners, and the effect of the provisions of the statutes for compensation, to which I have referred, were discussed by counsel and largely considered by the court, and although the conclusions upon which judgment was given do not decide the point here involved, the declarations of the several judges concerning it cannot be disregarded. They were made with deliberation—in discussing the position taken in behalf of property-owners, that certain portions of the act conferred power to appropriate the streets of the city to railroad uses, without requiring compensation for such rights of the abutting owners as would be affected thereby—and evidently had influence in bringing about the decisions rendered. They were thus more than dicta—they were part of the argument, and defined the boundaries by which, in the opinions of those judges, the act of the legislature was kept within the limits prescribed by the constitution. Earl, J., says, "whether they" (abutting owners upon the streets) "have property rights therein for which they are entitled, under the constitution, to compensation," "it will not be necessary to determine upon this appeal, for the reason that provision is made for compensation." And again, after referring to the same statute, under which the defendant claims, adds, "it seems to me there is no room for doubt that ample provision is made for any property rights the abutting owners may have in the streets." Allen, J., not only concurred in this statement, but added, "unless the statutes under which the petitioning corporation (the defendant here) claimed to exercise its privileges, did make provisions for compensation to individuals for every property right and interest, whether corporeal or incorporeal, which would be invaded or appropriated, in the construction and operation of the railway, they could not be sustained." He was however "of the opinion that the several acts, as a whole, did make ample provision for such compensation, and that every property right of individuals, including whatever right or interest, by way of easement, appurtenant to these lands or otherwise, owners of lots abutting on such streets have in such streets, as with those the fee of which is in the city, under the law of 1813, must under the constitution and the statutes, under which these proceedings are had, be compensated for." Whether such rights in abutting owners did exist, he expressed no opinion, but regarded it as an open question, "not having (as he said) been passed upon by the courts, or considered in any case in which the questions were involved." The other judges, Church, C. J., and Miller, J., who concurred in the result, express no opinion as to the steps by which it was reached, while others, Rapallo and Andrews, JJ., agree with Earl, J., as to the necessity for compensation if such rights exist, but dissent from the conclusion upon the ground that sufficient provision for compensation was not made.

It would seem therefore that the effect of those decisions, as well as the facts and the provisions of the constitution and statutes

to which I have referred, bring the controversy before us down to the inquiry before stated, viz.: whether the plaintiff, as abutting owner, has any individual property right or interest in the street over which the structure in question is to be erected. I have already expressed an opinion that he has. The cases already adjudged lead to that conclusion. Arnold v. Railroad Co., 55 N. Y. 661, is of the first importance in its bearing upon the question already considered. It was elaborately argued by distinguished and able counsel in the supreme court, and the opinion there delivered is quoted and much relied upon by the learned counsel for the defendant here, as expressing the result of the current of authority, and in point to sustain the proposition stated by him, that unless property is actually taken in the physical sense of the word, compensation cannot be made. The importance thus given to the case permits a fuller notice of it than would otherwise be necessary. It appeared that A. was the owner of a factory, and also the right to take water from a certain pond situate some distance from the factory and in no way adjacent thereto, and also the right to carry the water over certain land of one Innes lying between the pond and factory, "in a raceway or trunk, and either over or under the ground." He accomplished this by means of a trunk or raceway carried over it. The defendant acquired title to this intervening land by purchase, and became the owner in fee thereof, for railroad purposes, removed the trunk and placed it underneath the soil "and rails laid down and used by them," to the plaintiff's damage. No compensation was made or proceedings taken to acquire his right. Upon action brought, he was nonsuited at the circuit, upon the ground, among others, that the defendant did the act complained of in constructing its road, and under the authority of the statute through which it was organized; and the decision was upheld by the general term. It was there held that the plaintiff's right was an easement or appurtenant to his mill property, and the defendant was to be deemed to have acquired its roadway in subjection thereto.

The question therefore was identical with the one before us, whether the acts of the defendant constituted a taking of the property within the meaning of the constitution, supra, and Gilbert, J., said, that it was not to be regarded as an open one in this state, but as one settled by repeated adjudications —citing cases, which are relied upon by the respondent here. "They established," said the learned judge, "the principle that the legislature may lawfully authorize the construction of railroads and other works of a public nature without requiring compensation to be made to persons whose property has not actually been taken or appropriated for the use thereof, but who nevertheless suffer indirect or consequential damages by the construction of such works;" that the case was within that principle, and that no property of the plaintiff had been taken or appropriated by the defendant. "They may suffer," says the court, an injury by having the easement or servitude with which the roadway of the defendant is burdened, impaired, "but this," he adds, "is an injury which the property of the plaintiff suffers in consequence of the construction of a public work under legal authority, and not the taking of their property." Upon appeal however the judgment was reversed, this court holding that A.'s easement was an interest in land, that it was property within the meaning of article 1, section 6, of the constitution, supra, and therefore could not, nor could any portion of it, be taken for public use without compensation, both for the taking of the right to carry above the surface, and the loss sustained by the diminution of power, and increased expense, and Grover, J., says, "the value of the premises was necessarily impaired. The damages of the owner might, I think, have been assessed as provided for the condemnation of real estate, and thus the right to convey the water above the surface extinguished * * *. We have seen that the defendant did take the property of the plaintiff, and by the change it effected, impair its value. "Hence," he adds, "the cases cited by the counsel for the defendant, showing that when none of the land of the party is taken he cannot recover for the consequential injury thereto, caused by excavations, embankments, or structures lawfully made on other lands in the vicinity, have no application to this case."

We have here indeed a different element and a different medium by which the right of use is made available, but the principle is the same. Whether light crosses the open space unrestrained, or water is conveyed, by mechanical contrivance, over it, can make no difference. The right of unobstructed passage is alone in question in each case. In Doyle v. Lord, 64 N. Y. 432, a claim to an easement for the purposes of light and air, over a yard attached to a building, was upheld in favor of a lessee of part of the building, and his right to an injunction restraining the defendant from building upon the yard, established upon the ground that the easement went as appurtenant to the premises demised. The light passing into the windows from the yard was essential to the beneficial use of the store, and says Earl, J., "To this extent, in any view of the case, the plaintiffs were entitled to enjoy an easement in the yard. They were so far interested in it, that the defendants could not change its condition to their detriment." This rule established, it would follow that without compensation to the tenant and due proceedings at law, upon notice to him, the

yard could not have been appropriated to railroad purposes, although the owner of the yard consented.

In People v. Haines, 49 N. Y. 587, it was held, that although the proceedings then in question did not deprive the owner of the fee, and gave the public but an easement, it was such an interference with the property interests of the owner, as entitled him to the compensation made necessary by the constitution as a condition precedent to the taking of private property for public use. "It was the imposition," says Allen, J., "of a burden upon the lands, subjecting them to an easement in behalf of the public, derogatory to the rights of the proprietor, and depriving him of the full and free enjoyment of them."

In Eagle v. Railway Co., L. R. 2 C. P. 638, it was held that an easement was an interest in land, for the invasion of which compensation may be claimed, under the land clauses consolidation act (8 Vict. c. 18), and the principal was applied to a claim made for compensation in respect to damages sustained in consequence of diminution of light to the plaintiff's premises by the erection near them of the defendant's works. The statute referred to is in some respects dissimilar to the provisions of those acts under which the defendant justifies, but if I am right in my conclusion that the plaintiff's easement was acquired by grant or agreement, the grounds upon which the decision was put are equally available here. Bovill, C. J., said: "The improvement is common to all the neighborhood, but the injury to the plaintiff's premises by the diminution of light is peculiar to the plaintiff. For the defendant, it was urged that the only right to compensation is in respect of damage to an interest in land—damage to the land itself;" but different members of the court call attention to the fact before referred to by Bovill, C. J., saying the premises have sustained damage by reason of diminution of light, or have been affected thereby. Smith, J., said: "The invasion of a right of way, or of water, or of light, gives a cause of action," and disposing of the case in favor of the plaintiff—three judges delivering opinion—a critical examination is made of other decisions, including that of Ricket v. Railway Co., finally decided in the house of lords (L. R. 2 H. L. 175), Keating, J., saying: "It is now clearly settled," by that decision, "that compensation can only be claimed where land itself or an interest in land is injuriously affected; and that a damage to the plaintiff's trade by the obstruction of access to his premises by a public highway is too remote. In the present case, the award finds that the premises are directly injured by diminution of light."

Bovill, C. J., amplifies the suggestion made by him and above referred to, and Smith, J., says, "the right which has been invaded here is a right to an interest in land, and the damage in respect of which the plaintiff claims compensation is not too remote, but is directly consequent upon the loss of the plaintiff's property in the light."

In Oswego v. Canal Co., supra, it appeared that certain of the plaintiff's streets were appropriated by the defendant, under an act of the legislature (Laws 1823, c. 241), for the construction of a canal. In denying their liability to the plaintiff, Ruggles, C. J., says: "If the construction and maintenance of the canal deprived any of them (referring to the proprietors of lands within the plan of the village as laid out by the surveyor-general) of their easement in the land derived from its dedication, it was a proper subject of appraisal," and Edmonds, J., concurring, says: "There is nothing to show that these streets were public highways at the time the defendants were incorporated. All there is upon that subject is that the owner of the lands sold it in lots, bounding them on those streets. This did not make those streets public highways. It gave, to be sure, certain rights to the purchasers of those lots in respect to the strips of land thus called streets, but that was all." What some of those rights are, I have endeavored to show. The case cited holds that they are property rights, and the loss of them a proper subject of compensation.

On the other hand, it is contended by the respondent, that the principles heretofore enunciated by the supreme court of the United States and the courts of this state as the grounds of their decisions in other cases, and especially by this court in People v. Kerr, 27 N. Y. 188, and Kellinger v. Railway Co., 50 N. Y. 206, known as the surface railway cases, are at variance with this conclusion. It is due therefore to the importance of this case, and the elaborate and ingenious argument submitted by the respondent, that the cases so referred to be considered, viz.: Transportation Co. v. Chicago, 99 U. S. 635. The claim against the city was for damages for obstruction to the plaintiff's docks by the deposit of materials, the construction of a coffer dam, and other work necessary in the building of a tunnel for the extension of a city street.

The work was a necessary city improvement, and the interruption and obstruction was temporary—ceasing with the completion of the work. It was held that the plaintiff could not recover, and this upon the principle applied and practiced upon in all our cities, that the municipality, whether owners of the fee of the street, or vested with an easement only, may repair and improve it, "to adapt it to easy and safe passage." It permits the leveling of a street by filling up, or digging away, and if intersected by a stream, the erection of a bridge or tunnel. If in doing either of these things materials are necessarily collected, or an excavation made, to the present and temporary detriment of a lot-owner, he cannot complain. His ownership is subject to the exercise of this public right, and he must submit to the inconvenience in order that the street may be preserved. So in

placing a pavement, or excavating for a sewer, the stone for one, and the dirt from the other, may for a time incommode the lot-owner. To this, in like manner, he must submit, as to a burden provided for in his grant, or as one of the terms implied by his location upon a public avenue.

But this case would be quite different, if upon the coffer dam used in the construction of the tunnel, or upon the piles of rubbish or material, the city should erect a building, or from them extend the girders of a railroad, and I find nothing in the case cited which would prevent the lot-owner from maintaining his action. In Corning v. Lowerre, 6 Johns. Ch. 439, Kent, Chancellor, restrained the defendant by injunction from obstructing Vesey street in New York City, by building a house thereon, holding it was not only a public nuisance, but a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it, and working a special injury to them.

In accordance with the distinction which I have suggested between the character of the obstructing acts, is the decision in Barney v. Keokuk, 94 U. S. 324, a case also cited by the respondent. It is there held that there is no substantial difference between streets in which the legal title is in private individuals, and those in which it is in the public, as to the rights of the public therein, that in either case the street is to be deemed open and free for public passage, and agreeing in this respect with People v. Kerr, supra, for such other public uses as are necessary in a city, and do not prevent its use, as a thoroughfare. Within this principle, its surface might be broken up for the insertion of gas or water-pipes, or sewers, or occupied by rails imbedded therein for surface railroad. But its limit would be found in these and like uses. It appearing therefore that the premises in question adjoined a wharf, affording access to a navigable stream, it was held, that a packet depot was reasonably located, on the ground that "it is a necessary adjunct to the steamboat landing, and the use of the wharf and levee for the purposes of navigation, and does not occupy any portion of the original street."

But on the other hand, the construction of a permanent freight depot in that street was deemed an unauthorized and improper occupation of it, because "subversive of and totally repugnant to the dedication of the street, as well as to the rights of the public."

The railroad structure designed by the defendant for the street opposite the plaintiff's premises is liable to the same objection as the house in Vesey street (Corning v. Lowerre, supra), and the freight-house in the case last cited. It is true that travel on the surface of the street would, notwithstanding its erection, still be possible, but fifteen feet above it the street is wholly occupied, and light detained from the abutter's lots. The cases cited recognize private or special right in the individual, as well as a public right in a municipality—a substantial right and one to be protected.

Other cases cited by the respondent (Lansing v. Smith, 4 Wend. 21; and Gould v. Railroad Co., 6 N. Y. 522) involve the right of the state to deal with the navigable waters therein. They stand upon the assertion of an exclusive public right, common to every citizen, and deny a private right peculiar to an individual. But even in Lansing v. Smith, upon which the other rests, this right to regulate is stated by the chancellor to exist, "provided the legislature do not interfere with vested rights which have been granted to individuals." In the case before us there is in effect a covenant securing to the plaintiff's grantor a right peculiar to the individual, and necessary to the lot conveyed.

It is no doubt true that the grade of a street or highway may be altered by raising or lowering it, without liability on the part of the municipality to the abutter, but this is on the ground that the public had already paid a full compensation for all damage to be done by them to the adjacent owners by any reasonable or convenient mode of grading the way. But the principle applicable to such a case does not aid the defendant. There is no change in the street surface intended; but the elevation of a structure useless for general street purposes, and as foreign thereto as the house in Vesey street (Corning v. Lowerre, 6 Johns. Ch. 439), or the freight depot. Barney v. Keokuk, supra. The plaintiff's case may also rest upon another ground. The tenure of the city, although as I have assumed, in fee, is not absolute, but in trust for the purposes mentioned in the grant above referred to, and confers no other right or title upon the city than is given by the street opening acts of 1691, 1787, 1801 (1 Colonial Laws, p. 8; Laws 1787, c. 88; Laws 1801, c. 129), or the act of 1813 (2 R. L. 408), entitled: "An act to reduce several laws relating particularly to the city of New York 'into one act,' where in substantial repetition of the former acts, it is declared that the mayor, aldermeu and commonalty of the city of New York shall be seized of the lands taken for streets." "In trust nevertheless that the same be appropriated and left open for or as a part of a public street, avenue, square or place forever, in like manner as the other public streets in the said city are, or of right ought to be."

The trial court has indeed found without qualification, that the mayor, aldermen and commonalty of the city of New York are the owners in fee of Front street opposite the plaintiff's premises, and if by this was intended any estate except as limited by the purposes prescribed by the grant or by the statute (supra), viz.: the uses of a street, it would be necessary to sustain the plaintiff's exception thereto, and for this alone reverse the judgment. The decisions already made (In re Seventeenth Street, 1 Wend. 262; People v. Kerr, 27 N. Y. 188; Kellinger v. Railway Co., 50 Wend. 20) show that the title is so

limited. The argument of the respondent however proceeds upon that view of the title of the city, and the finding may be regarded as of that effect. It is however urged by the respondent, that the trust imposed upon the city is subject to legislative control. So far as the public or the city is concerned, this may be conceded, but a different question is presented when the rights of an adjoining owner are involved.

It is certainly well settled that where a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the party from whom it was derived, or for whose benefit it was created. Watertown v. Cowen, 4 Paige, 510; Hunter v. Sandy Hill, 6 Hill, 407; Warren v. Mayor, 22 Iowa, 351. We are not considering the right of the corporation to part with whatever interest it possessed under the dedication and trust, but the power of the corporation under the legislature to deprive the owner of a lot fronting on land so dedicated. It was somewhat discussed by Selden, J., in Williams v. Railroad Co., 16 N. Y. 107; and bearing in mind that the reservation or grant in the case before us was not unrestricted, but that the premises were to be kept open for the purposes of a street, the language of that learned judge is of weight here. His conclusion is that "it cannot be successfully contended, either that the dedication of land for a highway gives to the public an unlimited use, or that the legislature have the power to encroach upon the reserved rights of the owner, by materially enlarging or changing the nature of the public easement." Of course we do not overlook the fact, that in the Willlams case, the whole fee was in the plaintiff, subject to the easement in the city, while in the case before us a limited fee is in the city subject to the easement in the plaintiff; but the right of the adjoining owner and that of the city are as distinct in the one case as in the other, and it can make no difference how that right or interest is designated. In each case the adjoining owner is entitled to have the premises kept open as a public street. Whether acquired by grant or condemnation it carries with it that burden or limitation to its use; and the owner of the lot has an estate or interest by way of easement over the street, to the same extent and of the same degree as he has in the land to which it is annexed or appurtenant. As that is in fee so the easement is in fee also. Thus Blackstone, speaking of incorporeal heriditaments (book 2, vol. 1, p. 102, c. 7 [Cooley's Ed.]), says: "The dominium of property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seized as of fee of a way leading over the land of which Titius is seized in his demesne as of fee," and Denio, J., in Child v. Chappell, 9 N. Y. 255, speaking of a right to use a canal basin and wharf as laid out on certain plans in partition defines the idea the law attaches to such arrangements respecting real estate, and says: "The partition deeds in my opinion create a perpetual servitude, or in more modern language an easement in fee upon the undivided lands upon which the basin and wharf are situated, for the use and benefit of those parts of the original premises which were set off and released in severalty to the individual proprietors." And in Milhau v. Sharp, 27 N. Y. 624, the court, speaking of streets in the city of New York, say "the general rule that the fee is vested in the corporation would not be absolutely incompatible with a remaining fee in adjoining proprietors, under special circumstances." The dedication and the covenants in the deed, and the facts surrounding the original grant, make those circumstances here. As the owner therefore might retain and control his own lot, until by right of eminent domain it was taken from him, he may by virtue of his easement, and for its protection, restrain a use of the street, which obstructs the access of light and air to that lot, until by the same right the easement is taken from him.

The street railway cases, supra, are in no respect in conflict with this doctrine. The railroads in those cases were surface roads; no part of the land was rendered impossible to passage with any vehicle or by any wayfarer; when constructed there was as there before had been "a way between two rows of houses"—a street. The railway carriage was drawn along its surface on rails prepared for it, and differed in this respect alone from other means of transportation. There was nothing exclusive in the character of the railroad, nor was its use "inconsistent with any ordinary travel or passage over its tracks." This characteristic is pointed out by Emott, J., in People v. Kerr, supra, and the decision, as indicated by his opinion, and that of Wright, J., seems to have been put upon the ground that the maintenance of such a road did not impose a new burden upon any property, either of individuals, or of the city of New York. The act of the legislature permitting its construction did not enlarge the use of the street as a highway beyond the limitation or purpose of the trust, for execution of which the fee was vested in the city.

In the subsequent case of Kellinger v. Railway Co., supra, referring to the title of the city of New York to the land on which the streets are laid, the court say: "It is held, not as private property, but in trust for public use," with the further declaration that it was for the purpose of maintaining public streets. That the case of People v. Kerr, supra, was put upon the ground, that this trust was for the people of the whole state, and consequently its absolute control and direction was in the legislature—"that legislative authority to construct a railroad on the surface of the streets, without a change of grade, was a legitimate exercise of the power of regulating public rights for public uses,

and that the city was not entitled to compensation because it had, as a corporation, no property which was appropriated."

It seems to me that the positions upon which the judgment in these two cases rests have no place in the one before us. The use permitted was not inconsistent with the purposes of the trust. It was not denied that the abutting owner had a right to have the premises kept open above the surface. The question was not in either case. Here the facts show the erection of a framework and such a structure as will fill so much of the carriage-way of the street as is above fifteen feet above the roadway. I find no difficulty in agreeing with the views of the learned Judge Emott in People v. Kerr, and those of the ingenious and able counsel for the respondent as to the propriety of extending the law of city ways to meet the demands of a progressive civilization, but to uphold this judgment requires us to hold that the way may be extinguished. This cannot be done even by the legislature, without compensation to the abutting owner. It would be a perversion of law and reason to construe a trust to keep open land for street purposes, as subject to such regulation as would destroy the street, or enable the legislature or the municipality to grant away an exclusive right to any part of it. As we have seen, this was not done in the surface railway cases and it is precisely what, if the judgment before us is upheld, has been done here. So far as the public is concerned, it may stand. Not so as to the individual. As an abutter on the street, he has, as I have endeavored to show, a right to the light and air afforded by it. As to him, it would seem that the proceedings by which the land has been taken or the dedication made contain the terms of a contract, and if so, could be changed neither by the city, of its own motion, or in the exercise of authority derived from the legislature. People v. Morris, 13 Wend. 328; Sinking Fund Cases, 99 U. S. 746.

The particular purpose for which the land is taken is declared by the statute or by the grant in trust for that purpose. It also serves other purposes, and those purposes are not interfered with. Before any interest passed to the city, the owner of the land had from it the benefit of air and light. The public purpose of a street requires of the soil the surface only. Very ancient usage permits the introduction under it of sewers and water-pipes, and upon it posts for lamps. Of these things an abutting owner could not complain, but he is not required to hold his peace in the presence of such an erection as is threatened by the defeudant; and as it will, when completed, be permanent, continually causing injury to him, the remedy by injunction for which he prayed was appropriate and should have been granted. Milhau v. Sharp, 27 N. Y. 611; Williams v. Railroad Co., 16 N. Y. 97.

I also think the plaintiff may stand upon his first proposition, that he owns the fee of the street, and that the learned trial court erred in holding that the bed of Front street was excepted from the grants to which I have above referred. Front street was not then constructed. The description in terms embraces the land now occupied by it; and this I do not understand the learned counsel for the respondent to deny, but his argument is, that it was not intended to divest the city of the same title to Front street that it had in other streets, that "the clauses relating to the streets amount to a reservation of the streets from the operating clause of the granting part." I should rather say, that the effect of those covenants was to create in the city an incorporeal right—an easement fee—to have the land marked as streets kept open for public uses as such. If the grantee's covenant is literally construed, no other construction can be given to it; for the undertaking is to "construct the streets" on the lot granted.

The street therefore is to be erected over part of the land granted. Nothing is withheld or excepted from the grant—all passes. There is however the creation of an easement which before had no existence. When the land was conveyed, this was separated from the right to the land, or reserved. No part of the land was excepted from the grant. The whole, including the bed of the street, passed by the conveyance, subject only to street uses. In Richardson v. Palmer, 38 N. H. 212, a farm was granted, "reserving to the public the use of the road through said farm; also reserving to the White Mountains railroad the roadway for said road, as laid out by the railroad commissioners." The court says: "The design and operation of the exception in regard to the roadway of the White Mountains railroad can only be holden to be to subject the grant to the easement or right of user of that corporation, in the lands laid out for their roadway, while the lands themselves—the fee in the soil over which the railroad had been established—subject to that right or easement, passed to 'the grantee' under the deed." Many other cases are referred to by the appellant, to the same effect, and it seems to be well settled that such a right is not a right to the land, nor to any corporeal interest in the land, and the soil is in no sense the property of the owner of the right. The owner parts with no rights save such as are necessary to secure the land for street uses. Any other construction would defeat the grant and should not be indulged in. Duryea v. Mayor, 62 N. Y. 592; Craig v. Wells, 11 N. Y. 315; Starr v. Child, 5 Denio, 599. If this is so as to the original grants, we need spend no time in showing that the plaintiff succeeds to the rights so conveyed. There is no evidence that the grantors did not intend to convey their entire estate, so far as the street opposite the plaintiff's lot is concerned, nor to except his title from the operation of the general rule, that a lot bounded

on a street extends to its center. Here the plaintiff's lot is so bounded. Mott v. Mott, 68 N. Y. 246; Bissell v. Railroad Co., 23 N. Y. 61; Perrin v. Railroad Co., 36 N. Y. 120; Wallace v. Fee, 50 N. Y. 694. In whatever way therefore we view the plaintiff's case, the result is the same. A right of property in the street, with which, until properly appropriated and compensation made, the defendant cannot intermeddle.

This opinion was submitted to the court upon the first argument of this case. It has since been reargued with greater fullness than before, and a careful consideration of the points made by counsel has confirmed the views then entertained by me. As the judgment below is to the contrary it should be reversed, and a new trial granted, with costs to abide the event.

TRACY, J. The principal question to be determined in this case is, has the plaintiff's property been taken for public use within the meaning of the constitution of this state?

The plaintiff claims that by the true construction of the deeds from the city to his original grantors the bed of Front (then Water) street was included in the grant, and that he is now the owner of the fee of one-half of the bed of Front street in front of his lots. But if this claim be not sustained, then he insists that in the original grants of the premises in question the city of New York covenanted with his grantors that Front street should be and remain an open street forever. That this covenant, being for the benefit of the abutting lands, is one running with the land, and the right or privilege secured thereby constitutes property within the meaning of article 1, § 6, of the constitution, which provides that "private property shall not be taken for public use without just compensation."

The plaintiff's lots, Nos. 7 and 9, abutting on Front street, were formerly water lots, or lands under water. These lots and the streets were part of a larger tract owned by the city, which, prior to 1773, it caused to be surveyed and laid out into streets and lots and designated upon a map.

In May and December, 1773, the city granted and conveyed one of the plaintiff's lots, with other lands, to one De Peyster and the other lot to one Ellison. The boundary of the grant on one side began at Dock street, extending easterly across the street then shown on the map as Water (now Front) street, to what would be the westerly limits of the East river when the lands should be filled in and the streets mentioned in said grant made and constructed.

The plaintiff's lots are described as being upon the side of Water (now Front) street, as by the survey made of these and sundry other lots by Gerard Bancker, dated the 10th day of November, 1772, and filed in the office of the town clerk, as will more fully appear, with the appurtenances thereto belonging and appertaining.

The grantees covenanted and agreed to widen Dock street fifteen feet, and to build and construct a good and substantial street as so widened; to make and construct Water (now Front) street, and also to build and erect a good substantial dock or street on the outward boundary of their respective grants, and the deed then declares "which said several streets shall forever thereafter continue and be for the free and common passage of and as public streets and ways for the inhabitants of the said city, and all others passing through or by the same, in like manner as other streets of the same city now are, or lawfully ought to be." The trial court finds that the grantees made and constructed the several streets mentioned in the grant, and that the plaintiff is now the owner of said lots upon which "is erected a warehouse occupying the entire front, and four stories high." The defendant insists and the trial court found that by the true construction of the deed the bed of Front street was excepted therefrom, and never passed to the plaintiff's original grantors.

The necessary effect of this construction of the grant is to make the covenant found therein, that the said several streets shall forever thereafter continue to be public streets, a covenant of the city and not of the grantees; for we must assume that the covenant was made by the party who held the title to the bed of the street, and therefore had power to control its use, and not by one who had no title and consequently no such power. If the bed of the street was included in the grant, and the title thereto passed to the grantees, then it is even more clear that the covenant must be deemed the covenant of the city. The land designated on the map as a street with other lands on both sides thereof and abutting thereon, being conveyed to private persons, could not become a street except by proceedings taken for that purpose, or by a dedication of it by the owners to the public use, and its acceptance by the public. Mere dedication is not enough; lands so dedicated do not become a public street until accepted by the public authorities. The construction of the streets by the grantees in performance of the covenant on their part would amount to a dedication of the street to public use. The covenant of the city that the streets when constructed should be and remain public streets forever, constitutes an acceptance by the city of the lands thus dedicated. Oswego v. Canal Co., 6 N. Y. 257; Lee v. Sandy Hill, 40 N. Y. 442; Requa v. Rochester, 45 N. Y. 129. Assuming the construction placed upon the grant by the court below to be correct, we have to consider the effect of such a covenant in a grant of land made by a municipal corporation having authority to lay out and open streets, and to acquire lands for that purpose.

Where an individual conveys village or city lots, designated upon a map as abutting upon a public street, the map being referred to in the deed, it is well settled that the grantee acquires as against the grantor a right of way over the strip of land referred to as a street, although the same may not in fact be a public street, not having been accepted by the public as such; yet, as between the parties to the grant, the land is deemed to have been dedicated to the public by the grantor, and he cannot thereafter appropriate said lands to any use inconsistent with their use as a public street. Oswego v. Canal Co., 6 N. Y. 257; Cox v. James, 45 N. Y. 557; Smyles v. Hastings, 22 N. Y. 217; In re Mayor, 2 Wend. 472; In re Mayor, 1 Wend. 262.

The same rule applies to the state or a municipal corporation when it deals with its lands as owner or proprietor. Oswego v. Canal Co., supra.

In the case 1 Wend. 262, the court says, in such a case the grantee "obtains a perpetual right of way over the space called a street." In 2 Wend., supra, in such a case, the court says, "a covenant will be implied that the purchaser shall have an easement or right of way in the street to the full extent of its dimensions."

The city of New York having power to lay out and open streets, and to acquire lands for such purposes, had power to dedicate its own lands to such uses and to bind itself by a covenant with its grantees of abutting lands that a particular street should forever be kept as a public street. What interest then if any did the grantees acquire in the bed of the street by such grant and covenant?

M. purchased land in a village adjoining a public street, and it was at the same time agreed between him and the grantor that a triangular piece of land belonging to the latter, on the opposite side of the street, and in front of the land sold, should never be built upon, but should be deemed public property; and the grantor executed to the grantee a deed of the land sold and a bond for the performance of the agreement as to the triangular piece of land, both instruments being proved and recorded.

H. afterward purchased of the grantee the land opposite the triangular piece, after being informed by him of the privilege secured by the bond.

Held, by the chancellor, that H. was entitled to the benefit of the agreement, and that the grantee could not, without his (H.'s) consent, be permitted to make a new arrangement with the holder of legal estate in the triangular piece, by which buildings should be erected thereon. That this right or privilege constituted an easement in the triangular piece. It was further held that easements are annexed to the dominant tenement and pass to the grantee of such estate. It was also held that they are also a charge upon the estate of the servient tenement, and follow such an estate into the hands of those to whom such servient tenement or any part thereof is conveyed. Hills v. Miller, 3 Paige, 256.

The same question was again before the chancellor in the case of Watertown v. Cowen, 4 Paige, 510, where it was again held that a grantee of a lot adjoining a public square, who has a special covenant from the original owner of the ground that it shall be kept open for the benefit of his land, may restrain the grantor from violating the covenant. It was also held that a covenant in a deed of land not to erect a building on a common square, owned by the grantee in front of the premises conveyed, is a covenant running with the land, and was the grant of a privilege or easement which passed to a subsequent grantee of the estate without any special assignment of the covenant.

The principle of these cases was recently affirmed by this court in the case of Phœnix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400.

In the case last cited, H. conveyed land to S. by deed, and the grantee covenanted for himself, his representatives and assigns not to erect, or cause to be erected, any building or erection on a certain specified part of the premises conveyed, which adjoined the remaining land of the grantor, and it was held, all the judges concurring, that such a covenant, both in respect to the burden and the benefit, adheres to and follows the respective parcels of land through all the devolutions of the title; and the right to enforce the covenant passed to the plaintiff as subsequent grantee of H. of the dominant tenement, and the covenant would be enforced by a court of equity against a subsequent purchaser of the servient tenement, who purchased with notice of the covenant. These cases are directly in point, and it follows that, by the law of this state as interpreted and held by its highest courts for the last fifty years without criticism or doubt, the grantees of the city, by force of their grant, acquired the right to have Front street kept forever as a public street. The street thus became what is known to the common law as the servient tenement, and the lots abutting thereon the dominant tenement. Such servitude constitutes a private easement in the bed of the street attached to the lots abutting thereon, and passed to the plaintiff as the owner of such lots. That an easement is property, within the meaning of the constitution, cannot be doubted. This was expressly adjudicated in this court in the case of Arnold v. Railroad Co., 55 N. Y. 661. Arnold owned a nail factory, together with the right to take a certain quantity of water from a creek, and to convey it over or under the surface of intervening lands to such factory to propel machinery. For this purpose he built a trunk about six feet above the surface, through which the water was conveyed. In 1850, the defendant, having acquired title to a portion of the intervening lands, constructed tracks thereon, removed the portion of the trunk over

said surface without Arnold's knowledge, and constructed another trunk under the lands, through which the water was conveyed and then raised by a pen-stock into the old trunk near the factory. Held, by the concurrence of all the judges voting, that Arnold's easement was property within the meaning of article 1, § 6, of the constitution, and therefore could not—nor could any portion of it—be taken for public use without compensation.

In Doyle v. Lord, 64 N. Y. 432, this court held that a lessee of a store had an easement for the purpose of light and air, in a yard attached to the building. In Railroad Co. v. Kerr, 72 N. Y. 330, this court also held that an easement in a public street may be condemned and taken for public use.

The next question to be considered is, has the plaintiff's property been taken by the defendant, within the meaning of the constitution of this state? To constitute such a taking it is sufficient that the person claiming compensation has some right or privilege, secured by grant, in the property appropriated to the public use, which right or privilege is destroyed, injured or abridged by such appropriation. Has the plaintiff's easement in Front street been destroyed, or injured, by the appropriation of the street to the uses of the defendant's road? As we have seen, the plaintiff acquired nothing more than a right to have the street kept as a public street, and this must be deemed to be held subject to the power of the legislature to regulate and control the public uses of the street.

This brings us to the question whether the occupation of the street by the defendant's road is compatible with, or destructive of its use as a public street.

Front street is about forty-five feet in width, the roadway between the curbstones being about twenty-four feet wide.

The trial court has found as a fact that the defendant's road is to be constructed upon a series of columns about fifteen inches square, fourteen and a half feet high, placed about five inches inside the edge of the sidewalk and carrying cross-girders, which support four sets of longitudinal girders, upon which are placed cross ties for three sets of rails for a steam railroad; that the girders are thirty-nine inches deep; the longitudinal girders thirty-three inches deep; that the line of columns abridges the sidewalk and correspondingly interferes with the street and thoroughfare where such columns are located thereon.

That the structure as proposed on Front street will fill so much of the carriage-way of the street as is about fifteen feet above the roadway. The effect of such structure the court finds will be to some extent to obscure the light of the abutting premises opposite to it, and will to some extent impair the general usefulness of the plaintiff's premises and depreciate their value.

Can the street be lawfully appropriated to such a structure without making compensation to the plaintiff for his easement therein? This is a question of power. If the legislature has power to authorize such a structure, without compensation, its exercise cannot be regulated by the courts. If one road may be authorized to be constructed upon two series of iron columns placed in the street, another may be authorized to be supported upon brick columns, or upon brick arches spanning the street. If a superstructure may be authorized which spans the entire carriage-way at fifteen feet above the bed of the street, one may be authorized which spans the entire street from building to building, thus excluding light and air from the street and from the property abutting thereon. Thus an open street would be converted into a covered way, and so filled with columns or other permanent structures as to be practically impassable for vehicles. The city undertook and agreed with the plaintiff's grantors that Front street, when constructed by them, should forever thereafter continue and be kept as a public street in like manner as other streets of the same city now are or lawfully ought to be. This fixes with definiteness and precision the character of the street which the parties to the contract intended to secure. As the other streets of the city were, or lawfully ought to be, so this street was to be; it was to be an open street; one which would furnish light and air to the abutting property, and a free and unobstructed passage to the inhabitants of the city. A covenant to keep a strip of land open as a public street forever is a covenant not to build thereon, and brings this case directly within the principle of the cases of Hills v. Miller, Watertown v. Cowen, and Phœnix Ins. Co. v. Continental Ins. Co., supra. While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of, and repugnant to the uses of the street as an open public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact depending upon the nature and character of the structure authorized.

The court below found that the series of iron columns abridges the street, and the superstructure erected thereon obscures the light to the adjoining premises, and depreciates the value of the plaintiff's property.

The extent to which plaintiff's property is appropriated is not material; it cannot, nor can any part of it, be appropriated to the public use without compensation.

We think such a structure closes the street pro tanto and thus directly invades the plaintiff's easement in the street as secured by the grant of the city.

Whatever view be taken of the facts of this branch of the case, the same result must be reached. If the title to the bed of the street passed to the grantee of the city, then the public acquired a mere easement in

the street, resulting from its dedication to public use, the easement resting upon the express covenant of the owner of the fee that the street shall be kept as a public street forever. The fee remained in the owner making the dedication, and he having sold lots abutting upon the street, the purchaser, as we have already seen, obtained a perpetual right of way over the space called a street to the full extent of its dimensions. Whether the bed of the street was excepted from the grant of the city, and the title thereof never vested in the grantees, or whether the bed of the street was included in the grant and passed to such grantees, is of little importance, as in either event the plaintiff has a private easement of a right of way in the street, coupled with an express covenant that the entire space, marked on the map as Front street, shall forever be kept as a public street.

The defendant's railroad, as authorized by the legislature, directly encroaches upon the plaintiff's easement and appropriates his property to the uses and purposes of the corporation. This constitutes a taking of property for public use. It follows that such a taking cannot be authorized except upon condition that the defendant makes compensation to the plaintiff for the property thus taken.

The conclusion here reached is not in conflict with the determination of this court in the cases of People v. Kerr, 27 N. Y. 188; Kellinger v. Railroad Co., 50 N. Y. 206, and other similar cases

We agree with Church, C. J., in the case last cited, that "it is not quite clear as to what was intended to be decided by the court in People v. Kerr, relative to the rights of abutting owners."

In that case all of the private parties were abutting owners upon streets that had been opened under the act of 1813 whereby the city acquired the fee of the street, "in trust, nevertheless, that the same be appropriated and kept open for, or as a part of a public street, avenue, square or place, forever, in like manner as the other public streets in said city are, or of right ought to be." The only question which could have been there presented and determined, so far as the abutting owners were concerned, was whether the use to which the street was appropriated by the act authorizing the construction of what are known as horse or street railroads, appropriated the streets to a use inconsistent with their use as open public streets. Whether the rights of abutting owners in the streets were invaded, depended upon the nature and extent of the interest acquired by the public in the lands embraced therein. It is well settled that the state in the exercise of the right of eminent domain, or a corporation having the delegated power, may acquire such an interest or estate as in the judgment of the legislature the public services may demand. Heyward v. Mayor, 7 N. Y. 314. It may acquire the property in fee-simple absolute, or a qualified fee, or an easement merely, or the right to a temporary or permanent use of the property (Sixth Ave. R. Co. v. Kerr, 72 N. Y. 333), and the compensation to be made is regulated by the extent of the interest acquired. The proceedings by which land is acquired by the exercise of the right of eminent domain amount to a statutory conveyance of the same to the public or the corporation, and there is no distinction between such a conveyance and a voluntary conveyance made for a public use. Where property is acquired for public use by proceedings in invitum, the statute which authorizes the acquisition constitutes the contract between the citizen and the public; and when the interest has once been acquired it cannot be changed or enlarged without further compensation. It is only where the title is acquired in fee-simple absolute that the property may be converted to other public uses, or the particular use ceasing, it may be sold and conveyed, and converted to private uses. Heyward v. Mayor, 7 N. Y. 314; Commissioners v. Armstrong, 45 N. Y. 239. But where the public acquire, not the property itself, but the mere right to use it for a particular purpose, the title of the former owner is not extinguished, but is so qualified that it can only be enjoyed subject to the easement. In such case the title of the public is limited to the particular use, with the powers and privileges incident thereto, such as the right to use the timber and soil for the purpose of constructing and maintaining the street. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber and earth, and may enjoy the beneficial ownership of the fee for every purpose not incompatible with the public use for which the land was taken, and may maintain trespass, ejectment or waste (Jackson v. Hathaway, 15 Johns. 447; Presbyterian Soc. of Waterloo v. Auburn & R. R. Co., 3 Hill. 567), and the use ceasing, the title reverts to the former owner, freed from the public easement.

By the act of 1813 the city acquired the fee in the street, in trust however for a particular public use. Conceding that this trust is for the benefit of the abutting owner, as well as for the public, the only right which he has in the street is the right to insist that the trust be faithfully executed. So long as the street is kept open as a public street, the abutting owner cannot complain. The question presented in the case of People v. Kerr was whether the particular structure there authorized was inconsistent with the continued use of the streets as open public streets of the city. Whether it was or not was a question of fact dependent upon the nature and character of the structure there involved. The court found and determined that it was not inconsistent with the public uses of a public street, but was in aid of such uses.

And in Kellinger v. Railroad Co., 50 N. Y. 206, this court limits the decision in the case of People v. Kerr to a "simple declaration

that the legislative authority to construct a railroad on the surface of the street without a change of grade was a legitimate exercise of the power of regulating the use of public streets for public uses."

The question whether the abutting owners upon streets opened under the act of 1813 had the right to prevent their being converted to a use destructive of their existence as public streets was not deemed by the court to be involved in that case.

This appears from the report of the case. Davies, J., did not sit in the case. Rosekrans, J., was of the opinion that the power of the legislature extended only to governing the mode of passing upon the surface of streets, and Judges Balcom and Marvin, concurring in the result, stated that "there might be a private right in the owners adjoining the street to have free access to their premises, held under the original proprietor, of the tract embracing the street, of which such owner could not be deprived by the assent or surrender of the public, or of the general owner of the fee of the street, or both, without compensation for his incidental interest or easement in the street. This they said to preclude the conclusion, if such a thing were possible, that any such interest had been disregarded. They saw no such question in the case." But the question which was not seen to be involved in that case is the only question involved in the case now under consideration. The question here presented is, not whether the legislature has the power to regulate and control the public uses of the public streets of the city, but whether it has the power to grant to a railroad corporation authority to take possession of such streets and appropriate them to uses inconsistent with and destructive of their continued use as open public streets of the city.

Had the act in that case authorized the corporations to take permanent and exclusive possession of portions of the street, to build sidings, and to permanently occupy them with rows of cars standing in front of the stores and residences of abutting owners, and to erect permanent depot buildings within the limits of the streets for the accommodation of their passengers, we cannot doubt that a different result would have been reached in that case. The fact that a particular structure is found to be consistent with the uses of a street is no evidence that a different structure is not inconsistent with such uses. The conclusion reached in the present case is based upon the character of the structure here involved. The language of Wright, J., in People v. Kerr, that the abutting owners have no property, estate or interest in land forming the bed of the street in front of their respective premises to be protected by the right of eminent domain, must be construed with reference to the point thus being considered. This court had held in the case of Williams v. Railroad Co., 16 N. Y. 107, that where the public had acquired a mere right of way over the land of another, the laying down of railroad tracks and constructing a steam railroad in the street of a city was an enlargement of the use as understood and contemplated by the parties at the time the land was acquired, and imposed an additional burden upon the fee, and that such act could not be authorized without compensation to the owner.

This case was cited and relied upon in support of the claim of the abutting owners; but the answer was that the abutting owners did not own the fee of the street; that such fee being in the public the legislature might lawfully appropriate it to any public use consistent with the trust for which it was held, notwithstanding such use of a street may not have been known or contemplated at the time the land was acquired. Having parted with the fee the abutting owner could not maintain trespass or waste, and against an act which did nothing more than to impose an additional burden upon the fee, he could not invoke the inhibition of the constitution that private property shall not be taken for public use without compensation. Thus understood we think the language of Wright, J., not subject to criticism, and furnishes no support to the claim now made that the owner, whose lands were taken and are now held in trust, to be appropriated and used as open public streets forever, has no standing in court to insist that the trust shall be kept and that the streets shall not be destroyed.

The precise question was before the supreme court of the United States in the case of Railroad Co. v. Schurmeir, 7 Wall. 272. In deciding the case that court says: "Attempt is also made to justify the acts of the respondents (the railroad company) as grantees of the state, upon the ground that the complainant in dedicating the premises to the public as a street, levee and landing, parted with all his title to the same, and that the entire title vested in fee in the state; respondents rely for that purpose upon the statute of the territory of Minnesota. Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defense to the suit, because it is nevertheless true that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the act of the party in making the dedication. They could not nor could the state convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant."

That this trust created by the act of 1813 was intended to be for the benefit of the abutting owner as well as for the public we cannot doubt. City property has little or no value disconnected from the streets upon which it abuts. The opening of a city street makes the property abutting thereon available for the purposes of trade and commerce, and greatly enhances its value. The act of

1813 proceeds upon the assumption of this well-known fact, and the damages sustained by reason of the taking were assessed in view of the trust assumed by the public, that such lands were to be kept as open public streets forever. The public did not assume to take the lands in fee-simple absolute, but took and paid for a lesser estate; and in pursuance of the theory of the statute that the abutting owner has a special interest in the street, the cost of the lands was immediately assessed back upon the abutting property. All the owner has ever received for the lands taken under this act is the benefit accruing to his abutting property by reason of the trust for which the lands are held. Having surrendered his land in consideration of the trust assumed by the public, if the trust can now be abrogated and the streets surrendered to the uses and purposes of a railroad corporation, it follows that, by indirection, private property may be taken for public use against the consent of the owner and without compensation.

We have examined the other cases cited by the learned counsel for the respondent, and in none of them do we find authority for the claim here made. The case of Transportation Co. v. Chicago, 99 U. S. 635, is not in point. The injury there complained of was necessarily done in the extension of a city street. The interruption was temporary, ceasing with the completion of the work. This case is decided upon the elementary principle that the public have a right to make such use of land taken for a street as may be deemed necessary for its proper construction, repair or maintenance. Within this power is included the right to fix the grade of the street, and to change such grade from time to time as the necessities of the public may require; but whether the grade be elevated or depressed, it is still a public street, to which the public have the right of free access, subject to such police regulations as may be adopted by the public authority having charge and control of the same.

The argument has been pressed upon our attention with great ability that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application where the abutting owner owns the fee of the bed of the street; and we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. The obligation to preserve it as an open street rests in contract written in the statute under which the lands were taken and which may not be violated by the exercise of any legislative discretion. Whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case. The answer to the argument is that lands taken for a particular public use cannot be appropriated to a different use without further compensation; that the authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be erected, spanning the street and filling the roadway at fifteen feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and in respect to the land in question violates the covenant of the city made with the plaintiff's grantors, and in respect to lands acquired under the act of 1813 violates the trust for which such lands are held for public use.

The argument drawn from the great benefit which these roads have conferred upon the city of New York can have but little weight in determining the legal question presented in this case. No doubt these roads have added much to the aggregate wealth of the city of New York, and have greatly promoted the convenience of its citizens; but the burden of so great a public improvement cannot rightfully be cast upon a few of its citizens by appropriating their property to the public use without compensation. The inhibition found in the constitution against the right of the sovereign to appropriate private property to public use without making compensation therefor was intended to secure all citizens alike against being compelled to contribute unequally to the public burdens.

We are of opinion that the law under which the defendant is incorporated authorizes it to acquire such property as may be necessary for its uses and purposes, upon making compensation therefor. This was substantially determined in Re New York El. R. Co., 70 N. Y. 327; Gilbert El. Ry. Co., Id. 361.

We have reached in this case the following conclusions:

First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front street, which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property.

Second. That this right or privilege consti-

tutes an easement in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the constitution, of which he cannot be deprived without compensation.

Third. That such a structure as the court found the defendant was about to erect in Front street, and which it has since erected, is inconsistent with the use of Front street as a public street.

Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character—and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff—he has the right to restrain the erection and continuance of the road by injunction.

Sixth. That the statutes under which the defendant is organized authorize it to acquire such property as may be necessary for its construction and operation by the exercise of the right of eminent domain.

Seventh. The injunction prohibiting the continuance of the road in Front street should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same.

EARL, J. (dissenting). At the threshold of this case is presented the inquiry whether the plaintiff's lot extends to the center of Front street. I think it does not, and in reaching this I assume, without deciding it, that the city, by its deeds of conveyance in 1773, granted the fee of the land where the street now is to Ellison and De Peyster. Those deeds provided that the grantees should make certain streets through the lands conveyed among which was the present Front street, and that the streets after they were made should "forever thereafter continue and be for the free and common passage of and as public streets and ways for the inhabitants of the said city, and all others passing and returning through or by the same in like manner as the other streets of the same city now are or lawfully ought to be," and they contained a covenant that the grantees, their heirs and assigns, or some of them, should and would from and immediately after the streets were made and finished, "forever thereafter, at this and their own proper cost, charge and expense, keep the same, from time to time, in good and sufficient repair, plight and condition." There is no evidence that the owners of the lots ever kept Front street in repair, but the evidence tends to show that the city from an early period kept it in repair either with its corporate funds or with funds realized by it from assessments upon the lot-owners. The intermediate deeds of the plaintiff's lot prior to the deed to him are not found in the case. But in the deed to him dated December 18, 1849, the lot is described as follows: "All that certain lot of land situate, lying and being in the First ward of the city of New York aforesaid bounded northerly in front by Front street aforesaid, easterly by ground conveyed by John S. Conger and Sarah, his wife, to Elias H. Herrick by deed bearing date the 1st day of May, 1839, southerly by ground now or late of the said Elias H. Herrick, and westerly by Moore street aforesaid, containing in breadth in front in Front street thirty feet four and a half inches, and in the rear twenty-eight feet ten inches, and in length on either side eighty feet, be the same more or less." These precise measurements in feet and inches extend to the sides of the two streets only, and under such circumstances, how must the description in the deed be construed? It is a presumption of law that a conveyance of land bounded upon a highway carries with it the fee to the center of the highway as part and parcel of the grant, and the intention of the grantor to withhold his interest in a highway to the center of it, after parting with all his right and title to the adjoining land, is never to be presumed. But a grantor of land abutting on a highway may reserve the highway from his grant, and such reservation will be adjudged, when it clearly appears from the language of the conveyance that it was intended. Jackson v. Hathaway, 15 Johns. 447; Fearing v. Irwin, 4 Daly, 385; English v. Brennan, 60 N. Y. 609; Bank v. Nichols, 64 N. Y. 65; Insurance Co. v. Stevens, 87 N. Y. 287; Tyler v. Hammond, 11 Pick. 193; Burial Ground Soc. v. Robinson, 5 Whart. 21.

In Jackson v. Hathaway the description in the deed was "a certain tract of land beginning at a certain stake by the side of the road called the Old Claverack Road, etc., from which stake running east, twenty degrees south, two chains to another stake; thence south, thirty-two degrees west, seventeen chains sixty-four links, and thence" by specified courses and distances to the "first-mentioned bounds," and it was held, that the description did not include any part of the road; that "if a person over whose land a highway is laid out convey the land on each side of it, describing it by such boundaries as do not include the road or any part of it, the property in the road does not pass to the grantee, as it is excluded by the description in the grant; and it cannot pass as an incident, being in itself a distinct parcel of land and the fee of one piece of land not mentioned in a deed cannot pass as appurtenant to another." In Fearing v. Irwin it was held that a description "beginning at a point on the north-easterly corner of" two streets "and running thence northerly along the north-easterly side" of one of them comes to the margin only. In English v. Brennan the description in a deed began as follows: "Beginning at the south-westerly corner of

Flushing and Clermont avenues, running thence westerly, along Flushing avenue, twenty-five feet; thence southerly, at right angles to Flushing avenue, seventy-nine feet nine inches, to a point distant forty feet seven and a half inches westerly from the westerly side of Clermont avenue," and it was held that the title conveyed was confined to the margin of the streets, and in the opinion of Andrews, J., it was in substance said that the presumption is that the owner of land abutting on a highway owns to the center, but that it is much less strong in respect to lots in large cities; that in construing a grant of land adjacent to a highway, it is presumed that the grantor intended to convey his interest in the street; but that the presumption is rebutted if it appears by the decription that he intended to exclude the street from the conveyance. In Bank v. Nichols, it was held that where a deed described the granted premises as beginning at the intersection of the exterior lines of two streets, the point thus established controls the other parts of the description, and lines running along the streets are thereby confined to the exterior lines of the streets. In Insurance Co. v. Stevens it was held that the road-bed was excluded in the following description: "Beginning at a point on the southerly side of the Wallabout bridge road and adjoining the land now or lately belonging to John Skillimore," and after certain other courses, "north forty-eight degrees and nine minutes west, five hundred and ninety-four feet to the Wallabout bridge road, and thence along said road one thousand two hundred and twenty-five feet, to the place of beginning." In Tyler v. Hammond it was held that where a deed of land describes it as bounded on a road, but sets forth metes and bounds which plainly exclude the road, no part of the soil of the road passes by the grant. The particular description there was as follows: "Bounded north-westerly on Ann street, there measuring thirty-one feet six inches; north-easterly on Crudert alley, there measuring fifty feet two inches; south-easterly on Dock square, there measuring twenty-eight feet six inches, and north-westerly on the estate of the late Joseph Tyler, there measuring forty-eight feet." Wilde, J., used language quite applicable this case: "This is a very particular description of the land intended to be conveyed, in respect to which there can be no doubt or uncertainty. The lines are short and were measured, no doubt, with great exactness, and therefore a mistake in the side lines of twenty or thirty feet cannot be supposed." In the case of Burial Ground Soc. v. Robinson, the description in the deed there under consideration was very like that contained in the deed to the plaintiff. It was as follows: "Containing in breadth on Prince street" (which ran parallel with Washington street and north of it) "thirty-one feet four inches, and in length southwardly between parallel lines running at right angles with Washington street on the east line thereof ninety-eight feet six inches, and on the west line thereof seventy-three feet six inches and two-thirds of an inch, be the same in depth more or less to Washington street, where it contains in breadth east and west thirty-one feet; bounded on the north by the said Prince street, on the south by the said Washington street," and it was held that the deed did not convey any part of the soil of Washington street. Kennedy, J., writing the opinion of the court, after laying down the rules which govern in the construction of such deeds, used language very pertinent to this case, as follows: "What is here said is particularly applicable whenever the quantity of land conveyed is small and its extent is described with great nicety, as in all conveyances almost of city or town lots or parts thereof, and in the present case the ground intended to be conveyed is described with a remarkable if not very unusual degree of nicety and minuteness, as if it were intended to preclude all possibility of including any more than came within the metes and bounds as set out, not merely in feet and inches, but limited even to the very fraction of an inch."

But in addition to the precise measurements in plaintiff's deed limited not only to feet and inches but to a half inch, we have other circumstances bearing upon the construction to be given to the deed. For a long time anterior to the date of the deed Front street had become like the other streets of the city, and had been maintained and kept in repair by the city. It owned the fee of nearly all the streets within its limits, and it must have been the common practice of conveyancers to exclude the streets from the grants of adjoining lots by confining measurements to the margin of the streets. Reading the precise measurements in plaintiff's deed, in the light of these circumstances I think there is little ground for dispute that his grantors intended to limit their grant to the margin of the street, and that such intent should have effect is shown by the authorities above cited.

Therefore as the plaintiff did not own any of the soil in Front street, it matters not where the title to it rested. As to him, it may be treated as if it were in the city, and I shall so treat it in the further discussion of this case.

Whatever private rights then the plaintiff has in this street are such and such only as belong to him as an abutter upon the street. Such rights as he has in common with the public generally cannot be enforced in this action or in any other action in his name. It is not disputed that to maintain this action the plaintiff must show that in violation of the acts under which the defendant was organized, and of the constitution, "private property" of the plaintiff has been taken without compensation. It is not sufficient for him to show that he is injured or suffers dam-

age from the construction or operation of defendant's railway, or that his adjoining property is deteriorated in value. He must show that his private property is in some proper sense taken, and to this effect are nearly all the authorities in this country, except in states where provision is made in the constitution or laws that compensation shall be made for property damaged or injuriously affected, as well as for property taken. In Sedg. St. Const. Law, 519, the learned author, speaking of the constitutional provision which prohibits the taking of private property for public use without compensation, says: "It seems to be settled to entitle the owner to protection under this clause the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damages, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain." In Dill. Mun. Corp. § 784, it is said that "although the adjoining property may be injured, still it is not, in a constitutional sense, taken for public use." In Transportation Co. v. Chicago, 99 U. S. 635, Judge Strong said that "acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority." In O'Connor v. Pittsburgh, 18 Pa. St. 187, it was held, after two arguments of the case and much consideration, that the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed. See also the cases of Hatch v. Railroad Co., 25 Vt. 49, and Richardson v. Railroad Co., Id. 473, where will be found a very learned discussion of the subject and many observations quite applicable to this case. The same rule is laid down in Radcliff v. Mayor, 4 N. Y. 195. It was there supported by such cogent reasons and full citation of authorities as to place it beyond question in this state, and it has received the uniform sanction of our courts.

Our attention is called to two cases (Pumpelly v. Green Bay Co., 13 Wall. 166; and Eaton v. Railroad Co., 51 N. H. 504) which are supposed to take a new departure in the construction of the constitutional provision we are now considering. They are spoken of in the subsequent case of Transportation Co. v. Chicago as "the extremest qualification of the doctrine" to be found; they hold that permanent flooding of private property may be regarded as a "taking," and thus they may be justified on the ground that there was a physical invasion of the real estate of the private owner and a practical ouster of his possession.

We should not be embarrassed by any subtle meaning to be given to the word "property" in the constitutional provision. The broad meaning sometimes given to it by law writers whose definitions are more apt to confuse than enlighten, or a meaning which can be evolved only by philologists and etymologists, was probably not in the minds of the framers of our constitution; they must be supposed to have used the word in its ordinary and popular signification, as representing something that can be owned and possessed and taken from one and transferred to another. In popular parlance there is a distinction between taking property and injuring property. If the word is to have the broad meaning given to it by Austin and certain German and French civilians, to whose definitions our attention has been called, then it would include every interference with and injury or damage to land by which its use and enjoyment become less convenient or valuable. Such a sense has never been given to it or countenanced in any decision involving the constitutional provision as to taking private property. If the word is to have such a broad signification, then it was useless to provide in the English land clauses act of 1845, that compensation should be made for land taken not only but also for land "injuriously affected," and in the constitution and laws of some of the states, that compensation shall be made for both land taken and land damaged.

I do not deem it necessary to define precisely what property rights abutting owners have in the streets of the city of New York adjoining their lots. I will assume, without deciding it, that the streets cannot be absolutely closed against their consent without some compensation to them; for the limitations upon the power of the legislature in reference to closing streets have not been precisely determined in this state. Commissioners v. Armstrong, 45 N. Y. 234; Coster v. Mayor, 43 N. Y. 399; Fearing v. Irwin, 55 N. Y. 486. If the plaintiff has an unqualified private easement in Front street for light and air and for access to his lot, then such easement cannot be taken or destroyed without compensation to him. Arnold v. Railroad Co., 55 N. Y. 661. But whatever right an abutter, as such, has in the street is subject to the paramount authority of the state to regulate and control the street for all the purposes of a street, and to make it more suitable for the wants and convenience of the public. The grade of a street may, under authority of law, be changed and thus great damage may be done to an abutter. The street may be cut down in front of his lot so that he is deprived of all feasible access to it, and so that the walls of his house may fall into the street, and yet he will be entitled to no compensation (Radcliff v. Mayor, supra; O'Connor v. Pittsburgh, su-

pra; Callender v. Marsh, 1 Pick. 418); and so the street may be raised in front of his house so that travelers can look into his windows and he can have access to his house only through the roof or upper stories, and all light and air will be shut away, and yet he would be without any remedy. The legislature may prescribe how streets shall be used, as such, by limiting the use of some streets, or the parts of streets, to pedestrians or omnibuses, or carriages, or drays, or by allowing them to be occupied under proper regulations for the sale of hay, wood or other produce. It may authorize shade trees to be planted in them, which will to some extent shut out the light and air from the adjoining houses. Streets cannot be confined to the same use to which they were devoted when first opened. They were opened for streets in a city and may be used in any way the increasing needs of a growing city may require. They may be paved; sidewalks may be built; sewer, water and gas pipes may be laid; lamp-posts may be erected, and omnibuses with their noisy rattle over stone pavements, and other new and strange vehicles may be authorized to use them. All these things may be done and they are still streets, and used as such. Streets are for the passage and transportation of passengers and property. Suppose the legislature should conclude that to relieve Broadway in the city of New York from its burden of travel and traffic it was necessary to have an underground street below the same; can its authority to authorize its construction be doubted? And for the same purpose could it not authorize a way to be made fifteen feet above Broadway for the use of pedestrians? When the streets become so crowded with vehicles that it is inconvenient and dangerous for pedestrians to cross from one side to another, can it be doubted that the legislature could authorize them to be bridged, so that pedestrians could pass over them, and that it could do this without compensation to the abutting owners, whose light and air and access might to some extent be interfered with? These improvements would not be a destruction of or a departure from the use to which the land was dedicated when the street was opened; but they would render the street more useful for the very purpose for which it was made, to-wit: travel and transportation. If by these improvements the abutting owners were injured, they would have no constitutional right to compensation, for the reason that no property would be taken and the injury would be merely consequential. And if the public authorities could make these improvements, then the legislature could undoubtedly authorize them to be made by quasi public corporations, organized for the purpose, as it can authorize plankroad and turnpike companies to take possession of highways and take toll from those who use them.

So in process of time railways came to be used for transportation of persons and property; and a controversy soon arose whether they could be constructed in the streets of cities without compensation to the abutting owners. It was determined that they could not, when such owners owned the fee of the street. Wager v. Railroad Co., 25 N. Y. 526; Craig v. Railroad Co., 39 N. Y. 404. But where they do not own the fee they are entitled to no compensation, as no private property is taken from them within the meaning of the constitution. That this is the rule was distinctly recognized in the two cases last cited and was adjudicated in the cases of People v. Kerr, 27 N. Y. 188, and Kellinger v. Railroad Co., 50 N. Y. 206. In the case of People v. Kerr there was uncontradicted proof that the construction and operation of the railway in the street would cause serious damage to the owners of adjoining property, and that such property would be depreciated in value from twenty to twenty-five per cent, and the court found that the construction and operation of the railway "would be a material interference with and injury to the use and enjoyment of the lots fronting on said street in such manner and to such extent that the same would constitute a continuous private nuisance to the plaintiffs" as owners of adjoining lots; and yet it held that the abutting owners were not entitled to compensation. It was adjudged that the construction of a city railroad upon the surface of the street was an appropriation to public use; that the street was under the unqualified control of the legislature, and that any appropriation of it to a public use by legislative authority was not a taking of private property so as to require compensation to the city or abutting owners. The decision seems to have been based upon the broad ground that the legislature could authorize the land in the street which had been taken for or dedicated to a public use to be devoted to any public use whatever. But even if it did not go so far as this, it cannot be disputed that it went so far as to hold that the legislature could authorize the streets to be devoted to any public use not inconsistent with their use as streets.

In Kellinger v. Railroad Co., the case of People v. Kerr was approved, and it was held that the owners of property adjoining a street in the city of New York, laid out under the act of 1813, have an easement in the street in common with the whole people to pass and repass and also to have free access to their premises, but that the mere inconvenience of such access occasioned by the lawful use of the street by a railroad is not the subject of an action, and that a complaint alleging that defendant laid its track so near the sidewalk in front of the plaintiff's premises as not to leave sufficient space for a vehicle to stand, and that he and his family were thereby incommoded in leaving and returning to their residence, and the

rental value of his premises was greatly depreciated, did not contain a cause of action. Church, C. J., speaking of the case of People v. Kerr, said: "It clearly holds that the abutting owners had no property in the street, which was taken for the railroad, for which they were entitled to compensation."

The decisions in these two cases were in no degree based upon the fact that the railways were constructed upon the surface of the streets. It can make no difference in principle whether the railway be on the surface or above or below the surface so long as it serves the same public purpose, to-wit: the transportation of persons and property. The principle lying at the foundation of these cases, stated most favorably to the plaintiff, is that a railway was simply a new mode of using the streets for the purpose for which they were originally made, and that if the new use produced any greater inconvenience or injury to the abutting owners than the old use, it was damnum absque injuria. Nor did these cases proceed upon any distinction between horse railways and those upon which steam is the motive power. If the legislature could authorize a railway to be operated in any street by horse power, it certainly must have the same right to allow it to be operated by steam, electricity or any other motive power. As stated by the learned author in Thomp. Highways, 400: "The distinction between horse railroads and those on which steam is the motive power is not made by any of the cases in the court of appeals, but is expressly denied by some of them, and is in conflict with the reasoning and principle of all of them." In Wager v. Railroad Co., Smith, J., writing the prevailing opinion, said: "It is true that the actual use of the street by the railroad may not be so absolute and constant as to exclude the public from its use. With a single track, and particularly if the cars used upon it were propelled by horse power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property or of the increase of the burden upon the soil. It would present simply a question of degree in respect to the enlargement of the easement, and would not affect the principle." In the same case, Sutherland, J., in his dissenting opinion, said: "In this case the railroad, I assume, was intended to be and was operated by steam. I cannot see how that affects the question of power." In Craig v. Railroad Co., supra, Miller, J., writing the opinion, said: "I am at a loss to see any apparent distinction in the application of the rule between cases where steam power is employed and those cases where the road is operated by horse power." Judge Dillon, in his excellent work on Municipal Corporations (volume 2, § 577), says: "Where the fee of the street is in the municipality in trust for the public, or in the public, the control of the legislature is supreme, and it may authorize or delegate to municipal bodies the power to authorize either class of railways to occupy streets without providing for compensation either to the municipality or to the adjoining lot-owners." In Cooley, Const. Lim. 555, the learned author, speaking of the appropriation of the street to the use of all kinds of railroads, says: "A strong inclination is apparent to hold that, when the fee in the public way is taken from the former owner, it is taken for any public use whatever to which the public authorities, with the legislative assent, may see fit afterward to devote it in furtherance of the general purpose of the original appropriation, and if this is so, the owner must be held to be compensated at the time of the original taking for any such possible use, and he takes his chances of that use or any change in it proving beneficial or deleterious to any remaining property he may own or business he may be engaged in," and "when land is taken or dedicated for a town street it is unquestionably appropriated for all the ordinary purposes of a town street, not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants."

I think I have now sufficiently demonstrated that the legislature may authorize a surface railway operated by any motive power to be constructed in public streets, and that when the abutting owners do not own the fee of the streets they cannot claim any compensation for any inconvenience or injury caused them in the construction and operation of the railway, provided the street still remains open and practicable for the ordinary use of the public; and I am entirely unable to see why the reasoning and authorities which lead to this conclusion do not lead to the further conclusion that railways operated above the surface of the street may be authorized upon the same terms. An elevated railway is only a new mode of using the streets for the transportation of persons and property. It is not a change or subversion of the use for which the streets were originally opened and laid. The time came when the increasing business and population of the city of New York made the surface railroads a necessity. The time has now come when the convenience and the wants of a vast city make this new mode of travel and transportation, if not a necessity, at least a great convenience; and the devotion of the streets to the use of the elevated railways was only in furtherance of the trust and purpose for which the soil of the streets was originally dedicated or taken. If the surface railways were raised up fifteen feet in the streets and used for the same purpose for which they are now used, could not an act of the legislature make them lawful structures without compensation to the abutting owners? As relates to the question of legislative power, what difference could it make

whether a railway remained upon the surface or was raised up? Are the elevated railways unlawful elevated fifteen feet above the surface of the streets, while they would be lawful lowered to the surface of the streets? The legislature in regulating any street could build an embankment fifteen feet high and then authorize a surface railroad to be built upon that, to be operated by any motive power, and the noise and dust and interruption of air and light, and disturbance of privacy might be much greater than is caused by an elevated railway. Instead of building an embankment and thus raising the street, the legislature could authorize the whole travel of the street to be carried above the surface upon an elevated road by all the vehicles used for the transportation of persons and property, and the abutting owners could have no legal or constitutional ground of complaint. This is so because the fee which the city owns in its streets extends indefinitely upward and downward, and the space above as well as the space below a street may be utilized for street purposes.

I have not claimed that the legislature could, without compensation to abutting owners, authorize a street in the city of New York to be absolutely closed or wholly and exclusively appropriated to the use of a railroad. There are authorities which would tend to uphold such a claim. I do not affirm or deny the validity of such a claim. I leave the question of the right to exercise that more extensive legislative authority under the constitution to be determined in some future case wherein it shall be involved. It is sufficient to determine now that the legislature may constitutionally, without compensation to abutting owners, devote the streets of a great city to any use which is not inconsistent with the use for which they were opened or dedicated.

Front street, adjoining the plaintiff's lot, is not closed by this elevated railway, but it remains an open public street. The finding of the court is that it "will cause no substantial or material impediment to the passage of persons, animals or vehicles in and along the street, and but slight obstruction to the light or air from the street." We must take this case as the trial court has found it and not assume a case such as the imagination can paint. The stream of traffic and travel with no material diminution can flow through Front street as freely as before the construction of the railway. If it be a question of fact whether the street is in some sense closed by the defendant's structure, then the trial court must be deemed to have found the fact in favor of the defendant.

A steam railway operated upon the surface of one of the streets in the city of New York would probably be much more damaging than an elevated railway, and yet, as I have shown, it could undoubtedly be authorized without compensation to abutting owners; and it is impossible for me to perceive upon what reasoning or theory it can be claimed that abutting owners who have no rights upon the surface of a street for which they can claim compensation, yet have such rights when the railway is elevated above the surface. They have no easement upon or over the surface which cannot be interfered with and greatly impaired under legislative authority without compensation, and yet it is claimed that they have an easement somewhere up in the air which is under the constitutional protection as private property. Where do these aerial rights come from? They do not rest upon any grant, and as the doctrine of ancient lights has no footing in this country, they cannot rest upon prescription. Buildings may be erected upon a street so high and in such a way as to shut out light and air from an adjoining building. They may be erected so as to cast their shadows across the street upon houses there standing, and yet no right or easement is invaded. It cannot be doubted that the legislature could authorize surface railways to be operated with double-decked cars fifteen feet high and thus cause nearly all the inconvenience to the abutting owners of an elevated railway, and yet it must be conceded that under the authorities the abutting owners would have no legal cause of complaint.

Light and air are mere incidents and accidents of a street. Streets are not constructed and maintained to furnish them. They come from a street because the street exists, and when the street disappears, it is difficult to perceive how any right to them in an abutting owner survives. But as I have before said, it is sufficient now to determine that if there can be any such thing in a street as an easement for light and air, it is subordinate to all the uses and burdens to which a street may be subjected by the paramount authority of the legislature.

I am led to this conclusion by principles fairly to be deduced from decided cases which are binding upon this court as authority. I cannot perceive how this case can be determined in favor of the plaintiff without substantially overruling the cases of People v. Kerr and Kellinger v. Railroad Co. In Re Gilbert El. Ry. Co., 70 N. R. 361, Church, C. J., said that "the principles adjudicated in these cases will be regarded as obligatory upon this court in deciding future cases." In the case of Kellinger v. Railroad Co., the same learned judge, speaking of the case of People v. Kerr, said: "We should feel bound to adhere to this decision and its necessary legal results, even if we doubted its soundness, because large sums of money have been expended upon the faith of it, and in many obvious ways it has become a rule of property which should never be abrogated, except for the most cogent reasons." And more than four hundred years

before these utterances a learned English judge said: "If we judge against former judgments it is a bad example to the barristers and students of law; they will not have any faith in or give any credit to their books." Y. B. 33 Hen. VI. 41.

It is sufficient to say of the Elevated Railway Cases reported in 70 N. Y., that the questions we are to determine in this case were not there involved. It was there determined that provision was made in the rapid transit acts for compensation for any rights of private property which the abutting owners had in the streets of the city. But whether they had such rights or not was intentionally and expressly left an open question.

The plaintiff and many other abutters upon the streets through which this elevated railway is constructed undoubtedly suffer great damage from its operation and have the right to complain of the injustice done them; but they must seek their remedy by appealing, not to the courts, but to the legislature, and if they fail there, by appealing to the people who make legislatures. That is the final appeal open to every citizen who suffers injustice under the forms of the constitution and the laws. The legislature undoubtedly has ample power to compel the defendant yet to make compensation to abutting owners for all the damage done them, and arrest the exercise of its franchises if it shall refuse to make such compensation. Navigation Co. v. Coon, 6 Pa. St. 379. The power which it possesses under the constitution and the laws to alter or repeal the charters of corporations includes the absolute right to regulate the exercise of corporate franchises, and to prescribe the terms and conditions upon which they may continue to be exercised. Railroad Co. v. Brownell, 24 N. Y. 345.

I will close this discussion by quoting the language of a very learned jurist in Hatch v. Railroad Co.: "In the absence of all statutory provision to that effect no case and certainly no principle seems to justify the subjecting a person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damage to others in their property or business. This always happens more or less in all rival pursuits, and often where there is nothing of that kind. One mill or one store or school often injures another. One's dwelling is undermined or its lights darkened or its prospect obscured, and thus materially lessened in value by the erection of other buildings upon lands of other proprietors. One is beset with noise or dust or other inconvenience by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railroad as much as in the other cases supposed. These public works come too near some and too remote from others. They benefit many and injure some. It is not possible to equalize the advantages and disadvantages. It is so with every thing and always will be. Those most skilled in these matters, even empirics of the most sanguine pretensions, soon find their philosophy at fault in all attempts at equalizing the ills of life. The advantages and disadvantages of a single railway could not be satisfactorily balanced by all the courts of the state in forty years; hence they must be left, as all other consequential damage and gain are left, to balance and counterbalance themselves as they best can."

The judgment should be affirmed.

MILLER, J. (dissenting). I concur generally in the opinion of EARL, J., in this case, and especially upon the ground that the questions presented are settled by former decisions of this court which are cited in the opinion.

It may be assumed, I think, that in reliance upon these decisions the railway of the defendant was constructed, and as a rule of property has been fully established thereby, upon which parties have acted and rights have been acquired, they should not be overruled or disturbed.

The judgment should be affirmed.

FINCH, J. (dissenting). I concur in the opinion of my Brother EARL. His full and careful argument renders unnecessary a further discussion, and yet the importance of the case, and the gravity of the questions involved, seem to require at least a brief statement of the grounds upon which I dissent.

If the abutting owners have rights in the streets the public have such rights also; and where these come in collision one or the other must of necessity yield. Even if we grant that such owners have some right in the streets growing out of their frontage upon them, and that such rights are in the nature of private property, it still remains that such private property ends where the people's right begins; that the abutting owner has no private property except outside of the public right, and whatever he does have is only that which is left after the latter is exhausted. The right of the abutting owner, such as it is, rests upon the trust on which the city holds the streets, and that is expressed in the covenant applicable to the street in question, which is that it shall "continue and be for the free and common passage of and as public streets and ways for the inhabitants of said city, and all others passing or returning through or by the same in such manner as the other streets of said city are, or of right ought to be." I understand the meaning of this covenant to be that Front street shall forever be kept open to the free and unobstructed travel and passage of the public, in the same manner as the other streets are kept open to such travel; and that the abutting owner gets the benefit

of light and air and ventilation as the incidents of a due performance of that covenant. If therefore the city's covenant is observed, no right of the abutting owner is invaded, although the public shall use the street for travel and passage in a manner which lessens the light and air and ventilation which incidentally benefit such owner. If the street is kept open to free and unobstructed travel, and is used for the general passage of the inhabitants, the covenant is kept, and the abutting owner has received all his rights, even though his incidental benefits are lessened. The question then comes down to this: whether the construction and operation of the elevated railroad is within the public right, and the trust upon which the city holds the fee of the streets. If it is, nothing has been taken from the abutting owners, for their right cannot enter the boundaries of the lawful public use; and the ultimate inquiry is simply and only whether the streets as used by the elevated roads are nevertheless used and occupied as public streets for unobstructed passage and travel, and kept open as such. There is no finding of fact to the contrary in the case before us, and no evidence from which such an inference can be justly drawn. The streets in question are kept open to the free and unobstructed passage of the inhabitants. They are not even partially closed to such travel. On the contrary, what has been done has been done in the direct line, and in aid of the proper public use. Travel and passage have been aided and their facility increased, instead of being obstructed and hindered. We are not to put our own eyes or observation in the room of the evidence and the findings of the trial court. These findings are not that the street has been closed, wholly or even partially: they are not that the public use and public travel have been hindered or obstructed. No such fact is in any manner found or furnished to us as a factor in the conclusion to which we ought to come. On the contrary, the only and the solitary fact found in such direction, the only one even pointing to a violation of the city's covenant, is the presence of the supporting columns, standing inside the curb of the sidewalk. If these are unlawful then the lamp-posts, and the telegraph poles, and the supports for electric lights are pro tanto a closing of the street, and utterly without right. We have therefore in the case as I read it no evidence of a public use which transcends the public right; and that being so, no private right is or can be invaded, and no private property has been taken.

For reversal: ANDREWS, C. J., and RAPALLO, DANFORTH, and TRACY, JJ. For affirmance: MILLER, EARL, and FINCH, JJ.

Judgment reversed.

Distinction between taking and damaging property. Single cause of action. Unreasonable use of tracks in street. Statute of limitations.

FRANKLE v. JACKSON.

(30 Fed. 398.)

Circuit Court, D. Colorado. March 7, 1887.

In equity.

Browne & Putnam, for plaintiff. E. O. Wolcott, for defendant.

BREWER, J. This case is submitted on demurrer to the second and third counts of the answer. In her complaint, plaintiff alleges that since January 1, 1879, she has been the owner of certain lots on the corner of Fifteenth and Wynkoop streets, in Denver, on which, in that year, she built and has since kept a hotel. She further alleges that prior to 1879 the Denver & Rio Grande Railway Company entered upon said Wynkoop street, and laid down a railroad track, and that in 1880 it also laid down a side track between the main track and the sidewalk, and on the side of the street adjacent to her property, and that this was done without her consent, and without compensation; that the said company used this side track for standing cars, and loading and unloading coal at all hours of the day and night, converting that portion of the street into a coalyard. She also alleges that this continued until July, 1884, when the defendant was appointed receiver of said railway company by this court, and took possession of all its property, and that he has since continued to use said track and side track in the same manner. The second count in the answer pleads that the railway company entered upon the street in 1871, and constructed, and since, up to the time of the appointment of defendant as receiver, used the main track under the authority of an ordinance of the city of Denver. The third count pleads that in 1882 the railway company entered upon the street under like authority, and constructed the side track.

The question presented by the demurrers is whether the facts alleged disclose a cause of action continuous in its nature, and therefore giving each day a new action, or one single in its nature, and arising solely and fully at the time of the first entry and occupation of the street. I had occasion, when on the supreme bench of Kansas, to examine, in connection with my then associates, this question in several cases and in many aspects, and I shall therefore do no more now than state my conclusions, and refer to those cases.

(1) Where, under the constitution and laws of a state, compensation is limited to "property taken," and does not cover "property damaged," and the fee of the street is not in the adjacent lot-owner, the mere use of the street by a railroad company, when authorized by law, for the laying down of a track, and the running of trains, gives no cause of action to the lot-owner, although consequential injuries may result to him therefrom. The interference with the free use of the street he suffers in common with all, pro bono publico, although he may suffer more than others. Railroad Co. v. Garside, 10 Kan. 552, and cases cited.

(2) Where, however, as in this state, "property damaged" is within the constitutional guaranty of compensation, then any lot-owner, the value of whose lot is diminished by the laying of a railroad track and the running of trains in a street in front thereof, may have an action for such damages. City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6.

(3) In all cases in which a cause of action may exist, and in which it springs solely from the laying down of the track, and the subsequent running of trains in an ordinary, proper, and lawful manner, there is but a single cause of action; it involves, for the purpose of determining the compensation, the question of a diminution in value of the lot caused by the construction of the railroad; it arises at the time of the occupation of the street by the railroad company; and it is barred, like any other cause of action, after the lapse of the prescribed number of years from that date. A change in the ownership of the railroad property, neither revives an old nor creates a new cause of action. "Unlike actions for trespass to realty, where the plaintiff can only recover for the injury done up to the commencement of the suit, in suits of this kind a single recovery may be had for the whole damage to result from the act, the injury being continuing and permanent." City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Railroad Co. v. Mihlman, 17 Kan. 224; Railroad Co. v. Twine, 23 Kan. 585; Railroad Co. v. Andrews, 26 Kan. 702; Mulholland v. D. M., A. & W. R. Co., 60 Iowa, 740, 13 N. W. 726; Railroad Co. v. Loeb (Sup. Ill.) 8 N. E. 464; Railroad Co. v. Combs, 10 Bush, 393; Railroad Co. v. Esterle, 13 Bush, 669; Fowle v. Northampton Co., 112 Mass. 334.

(4) Although a railroad company may not be liable in damages for the occupation of a street, and the running of its trains thereon in a customary, reasonable, and proper manner, or has paid the full damages allowed therefor, it may still be liable to damages for any unreasonable, improper, illegal, and wrongful use of its track. The right to use a street for the running of trains gives no right to establish a repair shop thereon. A railroad company may be liable to damages if it obstructs the street by unreasonably and improperly leaving its cars standing thereon. It cannot abuse the right given it, to another's damages. Whatever use is reasonable and proper, it may enjoy without liability. When it goes beyond that, it is liable, as any other wrong-doer. What use is reasonable and proper will, of course, vary with the circumstances, and cannot be absolutely determined in ignorance of the surroundings. A cause of action for such injuries, they being changing and temporary in their nature, arises whenever and as often as they occur; and for each day's continuance of

the wrong a new cause of action arises. 10 Kan., 23 Kan., 26 Kan. 702, supra.

Applying these principles to the case at bar, the demurrer to the second count in the answer must be overruled. Such count clearly states a full defense to any action on account of the main track. It was placed in the street in 1871, and whatever right of action there may have been for the construction of such track, and the running of trains thereon in an ordinary and proper manner, arose at that time, and is long since barred. No improper use of such track is alleged. It is proper to run trains in the night as well as the day time, to run heavy freight trains, to ring bells and sound whistles, and no unreasonable or improper conduct in these respects is shown.

With regard to the side track, the occupation having commenced in 1882, the statute of limitations does not bar. A receiver, duly appointed to take charge of the property, affairs, and business of a corporation, is a proper party, in whose name suits by or against the corporation may be conducted. It may be doubtful whether the plaintiff is intending to count solely upon the original invasion of her rights by the occupation in 1882, the manner of use alleged being simply matter of aggravation, or relies also upon a wrongful and improper use. If the latter, it may be that the complaint should be amended so as to clearly distinguish between the two causes of action, and state each separately. However, I do not stop to determine that question. The demurrer to the third count in the answer will be sustained.

Weakening support of building. Implied authority for tunnel. Damnum absque injuria. Negligent exercise of lawful right. Municipal corporations may alter grade of street, when private corporation could not. Remote damages.

BALTIMORE & POTOMAC R. R. CO. et al. v. REANEY.

(42 Md. 117, 14 Am. Railway Rep. 330.)

Court of Appeals of Maryland. March 12, 1875.

Appeal from court of common pleas.

The facts of the case are sufficiently stated in the opinion of the court. From a judgment for the plaintiff, the defendants appealed.

Argued before BARTOL, C. J., and STEWART, MILLER, ALVEY, and ROBINSON, JJ.

William A. Fisher and Daniel Clarke, for appellants, George C. Maund and William A. Stewart, for appellee.

ALVEY, J. This was an action on the case, instituted by the appellee, the plaintiff below, to recover of the appellants for injuries alleged to have been done to his house, by reason of the construction of a railroad tunnel by the appellants, under the bed of Wilson street, in the city of Baltimore.

The house alleged to have been injured is situated on the southwest side of Madison avenue, and adjoins the house on the corner of that avenue and Wilson street, and stands twenty-four feet and four inches northwest of Wilson street; the two houses being joined together by iron girders and other secure fastenings. These two houses, and two others, forming a row of four, were built by Ogle, the party from whom the appellee subleased; and, at the time they were built, their proprietor had no notice, nor reason to suppose, that Wilson street had been, or would be, dedicated to the use of a railroad tunnel.

The injury alleged to have been done to the house, by the excavation of the street and the construction of the tunnel, was the weakening the foundation, causing the walls to crack, and a settling out of plumbline.

Exception was taken at the trial below, by the appellants, to the granting of the second, third and fourth prayers offered by the appellee, and to the refusal to grant the third and fifth prayers offered by the appellants. It is on these prayers that the questions arise to be decided on this appeal.

1. By granting the appellee's second prayer, the jury were instructed, that if they believed from the evidence the appellants, in constructing the tunnel under Wilson street, near the appellee's house, unnecessarily took up the pavement of said street, and excavated the same for the purpose of constructing the tunnel, and, by means of such excavation, damaged the appellee's house, by weakening its foundation and walls, and causing them to crack, and break, then the appellee was entitled to recover.

To this instruction the appellants urge several objections. They insist that it is erroneous, because it entirely leaves out of consideration the authority under which they were acting in constructing the tunnel, and also omits all question of negligence in excavating the street, but makes the right to recover depend upon the fact, whether the appellants unnecessarily took up the pavement of the street, and excavated the same; thus making the liability of the appellants to depend on the necessity of doing an act which was authorized to be done by competent public authority. The instruction was also specially excepted to, upon the ground that there was no evidence in the cause from which the jury could find that the pavement of Wilson street had been unnecessarily taken up, in making the excavation for the tunnel.

With respect to the question whether the pavement was unnecessarily taken up and the street excavated, the ordinance of the city provided that "the tunnel or tunnels mentioned and provided for in the preceding section, shall be so constructed and arched as to leave uninjured and secure the streets under which said tunnels shall be made; and if in constructing the said railroad across or under any of the streets or alleys mentioned in this ordinance, it shall become necessary to take up any pavement on said streets, or excavate the same, then, and in that event," the appellants should restore the surface of the streets to the same condition in which they were before. Upon a proper construction of this ordinance, it is very questionable whether the liability of the appellants could be made to depend upon the degree of necessity that might exist for taking up the pavement and excavating the street in making the tunnel. Who is to determine the question of necessity, or the degree of necessity, that would justify the removal of the pavement, and the making the excavation, if not the appellants, to whom the authority was given so to construct their tunnel? But without deciding this question, we are clearly of opinion, upon a careful examination of the record, that there was no evidence upon which the jury could have found that there was no necessity for the removal of the pavement and the excavation of the street. The only evidence upon the subject was that offered by the appellants, which was to the effect that no proper care or precaution had been omitted in the construction of the tunnel at the particular point, purposely to avoid all injury to the houses mentioned. Indeed, the counsel for the appellee do not pretend that they offered any evidence whatever upon the subject, but they insist that, inasmuch as the appellants offered affirmative proof of the fact that all due care was taken, it was competent for the jury not only to discredit or disbelieve the witnesses, but to find a different or a reverse state of facts from that testified to by them, and that without any other evidence

upon which to base such finding. The evidence upon this subject was all one way; and to infer that the pavement was unnecessarily removed from the simple fact that witnesses had testified that all proper care had been observed in executing the work, is a mode of reaching conclusions that cannot be indulged. It was the privilege of the jury to refuse credit to the appellants' witnesses; but while they might think proper to discard the testimony given by those witnesses, they could have no right to conclude as to a state of facts, to support which there was no evidence before them. Nor can we presume, for a moment, that the jury did so conclude; but, on the contrary, we should rather presume that they were governed by the unimpeached and uncontradicted evidence in the cause.

But, with respect to the other objections to the instruction, that of ignoring reference to the authority under which the appellants were acting, and omitting all question of negligence in making the excavation for the tunnel, they present the question, whether the omissions in those particulars deprived the appellants of any valid defense to the appellee's claim to recover.

If there had been negligence in the execution of the work, resulting in the injury complained of, then, it is clear, the appellants would be liable; for the principle is well settled, that if a party, by carelessness in making an excavation in his own ground, causes the fall of, or injury to, a house erected on the land adjoining, he is liable in damages for the injury. Dodd v. Holme, 1 Adol. & E., 493; Wyatt v. Harrison, 3 Barn. & Adol. 876; Humphries v. Brogdon, 12 Q. B. 739. Or, if a party acting under lawful authority inflict injury, in the manner of executing the authority, as by unskillfulness or negligence, he is liable for the consequences. Leader v. Moxon, 3 Wils. 461; Jones v. Bird, 5 Barn. & Ald. 837; Lawrence v. Railroad Co., 16 Q. B. 653; Manly v. Railroad Co., 2 Hurl. & N. 840; Add. Torts, 727.

In answer to the objection by the appellants to the instruction, that it omitted all reference to the authority under which the tunnel was made, it is contended by the counsel of the appellee, that there was really no proper authority in the appellants to construct the tunnel under the streets of the city; and if they were right in this position, it would follow as a matter of course that the appellants could have no legal justification for any injury that may have resulted from the construction of that work. But we are of opinion that the appellants had ample authority to tunnel the streets, derived both from the city and state legislature. The appellants' original charter of 1853 (chapter 194) manifestly did not contemplate the use of the streets of the city for the purposes of a tunnel; but the mayor and city council, by ordinance of the 29th of May, 1869, authorized such use, as far as they were competent, and prescribed the manner of its exercise. Whether the mayor and city council were competent to confer any such power in the use of the streets, is a question that need not now be decided; as the legislature, by the act of 1870, c. 80, sanctioned and ratified the authority given by the city ordinance. It is true, this latter act of 1870, being an amendment of the appellants' original charter, contains no express terms of ratification, but the terms used in the 7th section are equivalent to terms of express ratification. The authority given by the city to make the tunnel is recognized, and there is power given to charge additional freights and tolls for its use. This is a clear ratification, or grant of authority, at least by implication; and it is settled that such authority may be granted by implication. Springfield v. Railroad Co., 4 Cush. 63.

The appellants having authority to construct the tunnel, they contend that any damage that the appellee may have suffered to his house, by reason of the excavation of the street, is damnum absque injuria, and that no right of recovery exists unless it be shown that the power delegated to the appellants has been illegally or negligently exercised. To this, however, we do not assent.

In this case, the jury have found that the property of the appellee has been damaged to the extent of three thousand dollars; and it would be a reproach to the law, if the courts were required to determine that it was a case of damnum absque injuria, and that there was no redress for such a wrong. There is no reason why the appellee should be required to bear such a loss; it not being for any municipal benefit, but for the benefit of a private railroad corporation, with which he is no more concerned than any other individual of the state. If he could be required to bear this loss of three thousand dollars, he could and would be required to bear the loss, if it were to the full extent of the value of his property; and thus a party might have his house utterly destroyed, and yet be without a remedy to obtain redress. Such is not the state of the law, as applicable to a case like the present.

As against the municipal government, in the careful exercise of its right and power to grade, change and improve the street, there could be no cause of action for any unavoidable injury done; but as against the appellants, a private corporation in no wise connected with the municipal government, obtaining authority to use the streets in an extraordinary manner, for its own private purposes and profit, the case is quite different. As against such party, the owner of a plot of ground, with a building thereon, bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and state legislature to make the extraordinary use of the street, yet that authority must be exercised

at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power, the party producing it must be held liable. If, as we have seen, the injury be produced by the careless or negligent exercise of the authority, then there can be no question of the liability; but if due care be exercised, and the injury is the natural or inevitable result or consequence of the doing the act authorized to be done, then, in a case like the present, the party doing the act and producing the injury must indemnify the sufferer. That there was no negligence or want of care in doing the work is no answer in a case like this. If the injury was the inevitable result of making the tunnel, then, to the extent that the appellee's property was actually injured, it was substantially taken for the use of the appellants' road, and, of course, should be paid for. It is not to be assumed that either the city authorities or the legislature of the state, intended that the authority delegated by them should be exercised irrespective of the rights of private property; and if it were clear that they did so intend, it is far from being certain that such a purpose could be accomplished. Gardner v. Village of Newburgh, 2 Johns. Ch. 162; Eaton v. Railroad Co., 51 N. H. 504; Pumpelly v. Green Bay Co., 13 Wall. 166.

That the excavation of the street for the tunnel was lawful, and done in a lawful manner at the time, can constitute no defense to this action, if damages actually resulted from the work. There are many cases in which an act may be perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another; but from the moment such damage arises, the act becomes unlawful, and an action is maintainable for the injury. This is the case where a man sinks mines and makes excavations in his own land, doing no damage in the first instance to his neighbor, but subsequently causing his neighbor's land or his house to slide down into the excavation. Bonomi v. Backhouse, El., Bl. & El. 662; Smith v. Thackerah, L. R. 1 C. P. 564; Add. Torts, 9.

The case of Bonomi v. Backhouse, just referred to, was an action for injuries to the plaintiff's house, suffered by reason of the working of neighboring mines by the defendant. It was not found that there was any negligence or improper working of the mines under the plaintiff's premises, or under the land immediately contiguous thereto, nor that any part of the damage to the plaintiff's property arose from such working; but that the damage arose solely by the defendant's working the mines in other lands not contiguous to the plaintiff's premises, at a distance of 280 yards from them; the earth interveuing between the place worked and the foundation of the house gradually giving way, and finally the effect reached the foundation of the house, and caused the injury thereto. The plaintiff was held to be entitled to recover, upon the fullest and most careful consideration, the case being finally decided in the exchequer chamber. And Mr. Justice Willes, in delivering the final judgment of the court, said: "The question in this case depends upon what is the character of the right; viz. whether the support must be afforded by the neighboring soil itself, or such a portion of it as would be beyond all question sufficient for present and future support, or whether it is competent for the owner to abstract the minerals without liability to an action unless and until actual damage is thereby caused to his neighbor. The most ordinary case of withdrawal of support is in town property, where persons buy small pieces of land, frequently by the yard or foot, and occupy the whole of it with buildings. They generally excavate for cellars, and in all cases make foundations, and, in lieu of support given to their neighbor's land by the natural soil, substitute a wall. We are not aware that it has ever been considered that the mere excavation of the land for this purpose gives a right of action to the adjoining owner, and is itself an unlawful act, although it is certain that if damage ensued a right of action would accrue." And he further said that they were not aware that it had ever been supposed that the getting coal or minerals, to whatever extent, in a man's own land, was an unlawful act, although, if he thereby caused damage to his neighbor, he was undoubtedly responsible for it. The right of action was supposed to arise from the damage, not from the act of the adjoining owner in his own land. And this same case decides, as is also decided in Rowbotham v. Wilson, 8 El. & Bl. 123, and in Brown v. Robins, 4 Hurl. & N. 186, 102, that the right of support to land from the adjoining soil is a right of property, and not an easement; and hence, if that support be impaired or withdrawn, and injury ensues, the absence of negligence is quite immaterial.

Now, in this case, the owner of the corner house was entitled to such support to the foundation of his building as the bed of the street afforded, before it was excavated for the tunnel—certainly as against the appellants, having no interest in the soil of the street. And if the appellee's house was bound to the corner house, and was lawfully dependent upon it for its stability, then the withdrawal or disturbance of the natural support of the corner house, by the act of the appellants, whereby injury was done to the house of the appellee, such act furnished the latter a cause of action that entitled him to recover for such injury.

And without discussing the question further, we perceive nothing in the appellee's second prayer, which was granted, that in any manner prejudiced the lawful defenses of the appellants, or which furnishes substantial ground for the reversal of the judgment.

It also follows, from what we have said,

that the appellee's third prayer could not be objected to by the appellants. It made the right to recover to depend upon the finding of negligence in the construction of the tunnel, or the excavation of the street—an element not essential to the appellee's right to recover.. And as to the appellee's fourth prayer, that relates to the measure of damages proper to be allowed. The prayer would seem clearly to be correct, and we do not understand the counsel of the appellants to make serious objection to it. The jury were instructed to give such damages only as would compensate the appellee for the injuries done to his particular interest in the premises. Nothing less than this would be fair compensation.

2. The appellants, by their third prayer, sought to have the jury instructed by the court below, that unless the excavation of Wilson street, in the construction of the tunnel, "was the direct, immediate and proximate cause of the injury" to the appellee's house, the latter could not recover; and that, upon the finding of certain facts, set out in the prayer, the excavation of the street did not constitute the direct, immediate and proximate cause of the injury complained of, but that the giving way of the walls of the corner house, to which the house of the appellee was bound, was the direct, immediate and proximate cause of the injury; and that such was the case, notwithstanding the giving way of the walls of the corner house was the direct consequence of the excavation.

The appellants' fifth prayer presents substantially the same question, though in somewhat different form.

In the application of the maxim, "In jure non remota causa sed proxima spectatur," there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned.

It is certainly true, that where two or more independent causes concur in producing an effect, and it cannot be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the event would have happened at all, and a particular party is responsible for only the consequences of one of such causes, in such case, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence. Marble v. City of Worcester, 4 Gray, 395. But it is equally true, that no wrongdoer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense, that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done. Davis v. Garrett, 6 Bing. 716.

Now, the argument in this case is, that if no house had been built on the corner, bounding on Wilson street, the construction of the tunnel would not have affected the house of the appellee; and if his house had not been attached or bound to the corner house in the manner it was, the settling or inclination from a plumbline of the corner house would not have caused damage to the appellee's house; that the manner in which the two houses were bound or fastened together was not a proper mode of construction. But in answer to this it may be said, that the houses were built before the construction of the tunnel, and that the proprietor was not required to conform to any particular plan or mode of building to meet and obviate the possible danger of such a use of the street. There was nothing illegal in the mode of structure, and, as against the appellants, the appellee was entitled to have the house maintained as it was built. Moreover, it is not shown or pretended that the walls of the house would have cracked and broken, in the manner they are alleged to have done, but for the construction of the tunnel; and as we have seen, it is not that the damage may by possibility have happened, but it must appear that it would certainly have happened, without the agency of the cause complained of, in order to exonerate the party responsible for the effects produced by such cause.

The principle is well settled, that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes were set in motion by the original wrong-doer. Add. Torts, 5. This is clearly illustrated by the leading case of Scott v. Shepherd, 3 Wils. 403. There the defendant threw a lighted squib into the market-house, where persons were engaged in selling articles, and the squib fell upon a ginger-bread stall, and the stall-keeper, to protect himself, threw the squib across the market-house, where it fell upon another stall, and was again thrown off, and exploded near the plaintiff, and put out his eye. It was held, that the party who first threw the squib was responsible to the plaintiff for the injury, though it was urged that the plaintiff's eye was not put out by the immediate act of the defendant, but by the immediate

act of the party who last threw off the squib. All the injury, said the chief justice, was done by the first act of the defendant. That, and all the intervening acts of throwing, were to be considered as one single act. So in the case of Vandenbaugh v. Truax, 4 Denio, 464, where the defendant, having had a quarrel with a boy in the street, took up a pickaxe, and pursued the boy, and the latter ran for safety into a wine-shop, and upset a cask of wine, it was held that the defendant, the pursuer of the boy, was responsible in damages for the loss of the wine, notwithstanding it was upset by the boy. To these cases many more might be added, illustrative of the same general principle.

As will be observed, in the cases cited, the injuries complained of were immediately and directly produced by causes or agencies intermediate between the original wrong-doer and the sufferer, but those agencies were put in motion by the original wrong-doer, and hence he was liable. So in this case, if the making the excavation caused a disturbance of the foundation and a fracture of the walls of the corner-house, whereby injury, by reason of the connection between the two houses, was done to the appellee's house, that injury must be imputed to the first cause,—namely, the making the excavation.

This question of remote and proximate cause has been recently considered by this court, in the cases of Railroad Co. v. Gantt, 39 Md. 115, and Railroad Co. v. Constable, Id. 149, and the decisions in those cases, though made in reference to a different state of facts, would seem to be quite decisive of the question presented in this case.

Finding no error upon which the judgment should be reversed, we shall affirm the judgment.

Judgment affirmed.

Election. Exercise of power exhausts it.

BRIGHAM v. AGRICULTURAL BRANCH R. R. CO.

(1 Allen, 316.)

Supreme Judicial Court of Massachusetts. Jan. Term, 1861.

Action for damages to land entered upon and taken by defendant for a railroad. The question was whether defendant's charter authorized the taking of such land. There was a verdict for defendant. Plaintiff excepted. Exceptions sustained.

J. G. Abbott and G. A. Somerby, for plaintiff. B. F. Butler and W. P. Webster, for defendants.

MERRICK, J. The defendants were not authorized by their charter to take, in the circumstances under which they did take, the land of the plaintiff. They were empowered to locate and construct a railroad from a point in the village of Northborough, to another near to the center village in Southborough, passing, on its way, to the north of the house of Willard Newton. St. 1847, c. 269. Under the authority thus conferred upon them, they did in fact locate their road to a point north of Newton's house, and thence at an acute angle made by the trains on arrival from Northborough, and departure for Southborough, as shown on the plan referred to and exhibited at the argument. This location has heretofore been adjudged to be within the authority conferred upon the corporation. Newton v. Railroad Corp., 15 Gray, 27. Having thus legally located and established their road between the termini prescribed in their charter, their whole power had been exerted and exhausted. They had, in the first instance, an undoubted right of choice, as to the general course and direction of their road, limited only by the obligation imposed upon them to carry it to the north of the house of Willard Newton. But this right cannot be construed to be wholly without limitation or considered and treated as conferring an unqualified right to locate and establish a road to and through any and all parts of the state lying north of the house. It is to be exercised in a reasonable and proper manner, and in conformity to the clear and manifest purpose of the legislature, as developed in the provisions of the charter, in creating the corporation, and conferring upon it specific and definite powers. This purpose cannot be mistaken. The first and chief object was to cause the establishment and construction of a road between the villages of Northborough and Southborough, to accommodate all persons and travelers who could conveniently gain access to it when located in such course and direction as to pass on its way between the prescribed termini northwardly of the house of Newton. If, in the exercise of their right to select one of several practicable routes, it would originally have been competent to the defendants to adopt a line passing through or near to the village of Marlborough, which we do not perceive that there is any room to doubt, they ceased to possess any such authority after they had legally and actually made a location of their road, in such course and direction that no part of it was within a mile and a half of that place, that being the actual distance between them as shown on the plan referred to. But the defendants not only had no right of choice or selection between different practicable routes after they had once made a valid and legal location, but they do not appear to have located or constructed their railroad from the land of Newton to the village of Marlborough, even upon the assumption that they were, in so doing, in the exercise of any such discretionary authority conferred upon them. This extension was, after the junction of the tracks upon the land of Newton, wholly unnecessary to perfect the line of travel and transportation between Northborough and Southborough, and must consequently be considered as having been made without any authority whatever. They had, therefore, no right to enter upon or take the plaintiff's land for any such purpose, and the location and construction of their road upon and over it was a trespass, for which he has a right of action to recover the damages it has occasioned him.

Trespass.

His exceptions must therefore be sustained, and a new trial granted.

Negligence in construction. Lease. Contributory negligence. Question for jury. Duty to the public. Duty to servant of another railroad.

NUGENT v. BOSTON, CONCORD & MONTREAL R. R. CORPORATION.

(80 Me 62, 12 Atl. 797.)

Supreme Judicial Court of Maine. Jan. 25, 1888.

Wilbur F. Lunt and Joseph W. Spaulding, for plaintiff. Almon A. Strout, for defendant.

VIRGIN, J. By a contract of March 1, 1884, the Portland & Ogdensburg Railroad Company, for certain valuable considerations therein expressed, was permitted, among other things, to run all of its through freight trains, for one year at least, over that portion of the defendant's tracks between certain named stations, between which was the Bethlehem station; the defendant "assuming all liability and risk of accident arising from defect of road-bed or track, or default of its employés or servants." On June 19, 1884, while the permit was in full force, the Boston & Lowell Railroad Company leased for 99 years the defendant's railroad, stations, etc.; agreeing to save harmless the defendant "against all claims for injuries to persons during the term, from any and all causes whatever." The plaintiff was rear brakeman on a Portland & Ogdensburg special freight train, bound west. While he, in pursuance of a signal for setting brakes, was rapidly ascending the iron ladder on the side of a box car to perform his duty of setting the brake thereon, the train being in motion, his head came in contact with the end of the depot awning, of same height as the car, and 18 inches therefrom, and he was thereby knocked off between the cars, and, before he could extricate himself, his right arm was so crushed by the wheels of the saloon car that amputation became necessary. The jury, after a charge to which, so far as the general merits of the case is concerned, no exception is alleged, returned a verdict for the plaintiff for $3,100. Under the instructions, the jury must have found (1) that the awning was negligently constructed on account of its proximity to the passing car; (2) that the injury was caused solely thereby; and (3) that the plaintiff was in the exercise of ordinary care at the time of the injury.

It is contended that the plaintiff was guilty of contributory negligence, and that, as the facts in relation thereto were undisputed, the question was one of law, and should therefore have been decided by the presiding justice, which he declined to do, but submitted it to the jury. While there are numerous cases wherein questions of the negligence of both parties, in actions of this nature, have been decided by the court on undisputed facts, still the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions. Brown v. Railroad Co., 58 Me. 384; Lesan v. Railroad Co., 77 Me. 85, 91; Shannon v. Railroad Co., 78 Me. 52, 60, 2 Atl. 678; Snow v. Railroad Co., 8 Allen, 441; Treat v. Railroad Co., 131 Mass. 371; Peverly v. Boston, 136 Mass. 366; Lawless v. Railroad, Id. 1; Railroad Co. v. Stout, 17 Wall, 657, 663, 664. As a practical illustration of this proposition: The conductor of a freight train had resided at the place of accident for 20 years, and, as conductor and brakeman, passed the station once or twice daily for 7 years. Just as his train started up, he caught hold of the side ladder of a passing car, and, without any call of duty there, as he climbed towards the top, was struck and killed by the roof of the depot which projected over, and within 34 inches of the car, and the court was divided on the questions of negligence involved. Gibson v. Railway Co., 63 N. Y. 449. So in another case where a brakeman (the plaintiff) who had pulled out the pin and disconnected a portion of the train from the engine, was walking beside the train, and, on signal for brakes, ran up the side ladder of a car, and was struck, knocked off, and lost his arm, by the awning which projected within 18 inches of the car, the court held the plaintiff not guilty of contributory negligence, but set aside the verdict of $10,000 as excessive. The court remarked: "It would be preposterous in us to say, or to ask a jury to say, that a brakeman, engaging in the service of the company, must be held to know whether or not there may be one among the station houses whose roof or awning so projected over the line of the road, that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by collision with it." Railroad Co. v. Welch, 52 Ill. 183. We are of opinion that the presiding justice very properly submitted to the jury the question of the defendant's negligence, and also that of the plaintiff's exercise of ordinary care.

Moreover, a careful examination of all the testimony bearing upon these questions, aided by the exhaustive argument of counsel, has failed to satisfy us that we ought to interpose and set the verdict aside. And, without taking space to state our reasons at length, we remark: The train never stopped at this station, except when obstructed by another, and occasionally down by the tank for water. His attention was never particularly called to the nearness of the awning, as he had no occasion to notice it in passing. When the accident happened the plaintiff was engaged in the prompt performance of a call to active duty. The exigency caused by the repeated starting and stopping of the mixed train required his speedy ascent to the top of the car by means of the ladder. Before he reached it his car, being in motion, arrived at the awning. Due care on the part of the defendant required space enough between the car and the awning for reason-

able action of body, arms, and legs of the brakeman, whose duty required him to ascend the ladder there. It was deficient in this respect, and the plaintiff, with his attention properly fixed on his duty, was struck. It is no answer that the train, though on a down grade of 30 feet to the mile, might be handled by the engine when working steam. The plaintiff's duty was not to rely on the possibility of the engine's holding the train, but to perform the duty signaled by the conductor standing on the engine; and he lost his right arm in the prompt attempt to perform it, in consequence of the defendant's faulty awning. The acts of the plaintiff "cannot be judged of by the rule applicable to the persons engaged in no special or particular duty." The plaintiff's previous knowledge of the awning must, on account of his few opportunities for gaining it, have been comparatively slight, and was by no means decisive. "The service then and there to be performed was of a character to require his exclusive attention to be fixed upon it, and that he should act with rapidity and promptness; and it could hardly be expected that he should always bear in mind the existence of the defect, even if he knew it, or be prepared at all times to avoid it." Snow v. Railroad Co., 8 Allen, 441, 450.

But while this rule may not be seriously questioned as between a railroad company and its own employés, the defendant challenges its application as between it and the plaintiff. This presents the question whether a railroad company, over a section of whose track another company—by virtue of a contract—runs its trains, is liable in tort to the latter's brakeman, who, without the fault of himself or of his co-employés, receives a personal injury while in the performance of his duty on his employer's train, solely by the reason of the negligent construction of the former's depot. We are of opinion that it is. In such case, the only materiality which attaches to the contract between the companies is to make certain that the plaintiff was lawfully, and not a trespasser, on the defendant's road. And although the defendant, in its contract with the Portland & Ogdensburg Company, in express terms "assumed all liability and risk of accident from a defect of road-bed, track, or default of its employés," nothing was thereby added to the defendant's legal obligation and duty; these terms did not express all which the law required of railroad companies as to the reasonable safety of its station-houses. Tobin v. Railroad Co., 59 Me. 183. It is common learning that as a compensation for the grant of its corporate franchise, intended in large measure to be exercised for the public good, the common law imposed upon the defendant a duty to the public, independent of contract and coextensive with its lawful use, to keep its road and its appurtenances in a reasonable, safe, and proper condition. Thomas v. Railroad, 101 U. S. 71, 83; Bean v. Railroad Co., 63 Me. 293, 295. If the cause of action were a breach of the contract, the plaintiff could not maintain an action thereon for want of privity. But this is an action, ex delicto, for an injury caused by a neglect of a duty created by law. Broom, Com. Law (4th Ed.) 675, 676, and cases. And, for the neglect of such a duty, privity is not essential to the maintenance of an action of tort therefor. Campbell v. Sugar Co., 62 Me. 552, 564; Broom, Com. Law, 673 et seq. This principle is variously illustrated by the numerous cases cited in Broom, Comm. 655, 670. Thus, a railroad company is liable for the loss of a passenger's luggage, whose fare was paid by another, not on account of breach of contract, but of legal duty. Marshall v. Railroad Co., 11 C. B. 655. So, where the defendant sold naphtha to one known to him as a retailer of fluids, to be burned in lamps for illuminating purposes, and a retailer sold a pint thereof to the plaintiff to be used in a lamp, and it exploded, the defendant was held liable, "not upon any supposed privity between the parties, but upon a violation of duty in the defendant, resulting in an injury to the plaintiff." Wellington v. Oil Co., 104 Mass. 64, 67. So, where a chemist compounded a hair wash, and knowingly sold it to a husband for the use of his wife, who was injured by its use, the wife sustained an action of tort for the injury on the ground of the defendant's breach of duty. George v. Skivington, L. R. 5 Exch. 1. In like manner "where a stage proprietor," said Parke, B., "who may have contracted with the master to carry his servant, is guilty of neglect, and the servant sustains personal damage, he is liable to the latter; for it is a misfeasance towards him, if, after taking him as a passenger, the proprietor or his servant drives without care, as it is a misfeasance towards every one traveling on the road. So, if a mason contracts to erect a bridge, or other work, over a public road, which he constructs not according to the contract, and the defects are a nuisance, a third person, who sustains an injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between himself and the injured person, or by showing that he is responsible to another for breach of the contract." Longmeid v. Holliday, 6 Eng. Law & Eq. 563. So, where, a station being in the joint occupation of the defendant and another railway, the plaintiff's decedent, a blacksmith in the service of the other railway, while engaged in repairing one of its wagons on a siding at the station, was killed by the negligent shunting of the defendant's train on that siding, a motion to set aside a verdict for the plaintiff was overruled. Vose v. Railway, 2 Hurl. & N. 728.

And it seems that an apothecary who ad-

ministers improper medicine to his patient, or a surgeon who unskillfully treats him for his injury, is liable to the patient even when the father or friend of the patient was the contractor. Pippin v. Sheppard, 11 Price, 400; Gladwell v. Steggall, 5 Bing. N. C. 733, 35 E. C. L. 392; Thomas v. Winchester, 6 N. Y. 397.

The principle is sustained in the well-considered case of Sawyer v. Railroad Co., 27 Vt. 370, which was re-examined and reaffirmed by the same learned court in Merrill v. Railroad Co., 54 Vt. 200. Also in Smith v. Railroad Co., 19 N. Y. 127; Snow v. Railroad Co., 8 Allen, 441; Pierce, R. R. 274; Patt. Ry. Acc. Law, § 228; 2 Wood, Ry. Law, 1338, 1339 and notes. We are aware that this view is not in accordance with Murch v. Railroad Corp., 29 N. H. 35, and Pierce v. Railroad Co., 51 N. H. 593, which cases were cited by a divided court in this state on another point (Mahoney v. Railroad Co., 63 Me. 72); but, notwithstanding our high opinion of the learned court which pronounced those opinions, we think the views herein declared are more satisfactory. Our opinion therefore is that the plaintiff had the lawful right, as brakeman on the train of the Portland & Ogdensburg, to pass and repass by the Bethlehem station-house of the defendant, which therefore owed a duty to him to construct and maintain its station-house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care; and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor, unless the leasing and consequent full possession of the defendant's road by the Boston & Lowell constitutes a defense.

It is declared to be the settled law of this country that one railroad corporation cannot, without statutory authority, divest itself of, or relieve itself from, any duty or liability imposed by its charter or the general laws of the state, by leasing its road and appurtenances to another. Railroad Co. v. Winans, 17 How. 30; Thomas v. Railroad, 101 U. S. 71, 83. Assuming the lease of the defendant road, station-house, etc., to the Burlington & Lamoille to have been duly authorized by the respective legislatures of the states which granted their charter, and that the lessee had, months before the plaintiff's injury, received under the lease full possession, management, and control, was the defendant thereby relieved from liability to this plaintiff for his injury? This court has held that an authorized lease of a railroad does not relieve the lessor from the liability under the general statute, nor an injury caused to property along its line by fire communicated by a locomotive of the lessee. Pratt v. Railroad Co., 42 Me. 579; Stearns v. Same, 46 Me. 95. In Massachusetts, both lessor and lessee are held liable for the injury under a like statute. Ingersoll v. Railroad Co., 8 Allen, 438; Davis v. Railroad Co., 121 Mass. 134. Courts of the highest respectability have held, in well-considered opinions, that the duly-authorized leasing of one railroad to another does not absolve the lessor from liability to a passenger for injury caused by the negligent acts of the lessee's employés, unless the statute authorizing the lease contains an express exemption to the lessor; that "grants to corporations, whether of powers or exemptions, are to be strictly construed, and their obligations are to be strictly performed, whether they may be due to the state or to the individuals." Singleton v. Railroad, 70 Ga. 464; Nelson v. Railroad Co., 26 Vt. 717; 1 Redf. R. R. 590. This view is adopted and sustained in an opinion reviewing the cases and authorities, by the court in Illinois. The court in its opinion does not rest its decision "upon the narrow ground alone of the lessee being in the exercise of a franchise which belonged to the lessor, and, in so doing, is to be held as the servant of the lessor corporation; but in consideration of the grant of its charter, the corporation undertakes the performance of duties and obligations towards the public; and there is a matter of public policy concerned that it should be relieved from the performance of its obligations without the consent of the legislature;" adding, "there is no express exemption in the statute, which authorized the lease." Balsley v. Railroad Co., 8 N. E. 859. See, also, Pierce, R. R. 244.

In this state, where the defendant had leased its road under the authority of a statute which expressly provided that "nothing contained therein * * * shall exonerate the lessor from any duties or liabilities imposed upon it by the charter or by the general laws of the state," a divided court held that the lessee, and not the lessor, was liable to a passenger injured by an assault and wrongful expulsion from its train by one of the lessee's servants. Mahoney v. Railroad Co., 63 Me. 68. This case, however, does not meet the facts in the case at bar; for there the injury complained of resulted solely in the wrongful acts of the servant of the lessee, who had sole control of the trains, and not as here from the wrong of the lessor in the negligent original construction of its depot. And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility. Railway Co. v. Curl, 28 Kan. 622. The covenant in the lease to "save the lessor harm-

less," etc., is predicated of an implication of a primary liability on the part of the lessor. It is an obligation which in nowise affects the plaintiff, or the defendant's liability to him, but is simply a contract for reimbursement for such damages as may in anywise be recovered against it by the plaintiff, and other lawful claimants, whose injury results from its breach of duty owed them.

We are also of opinion that the defendant is liable, under the rule which governs the responsibility of a lessor of demised premises, for their condition; for it is settled law that, when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable—whether in or out of possession—for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit, he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a non-feasance. Among the numerous cases supporting this general view is: Rosewell v. Prior, 2 Salk. 459, more fully reported in 12 Mod. 635, 639, where the defendant erected a house, thereby obstructing the plaintiff's ancient lights, and demised it to another; and the court held the "action well brought * * * for, before his assignment over, he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting over." See, also, Rex v. Pedly, 1 Adol. & E. 822; Staple v. Spring, 10 Mass. 72; Fish v. Dodge, 4 Denio, 311; House v. Metcalf, 27 Conn. 631; Todd v. Flight, 9 C. B. (N. S.) 377. In the last case Earle, C. J., after reviewing Rex v. Pedly and Rosewell v. Prior, said: "These cases are authorities for saying that, if the wrong causing the damage arise from the non-feasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle, so contended for on behalf of the plaintiff, is the law, and that it reconciles the cases." Also, Nelson v. Brewery Co., 2 C. P. Div. 311; Owings v. Jones, 9 Md. 108; Ganby v. Jubber, 5 Best & S. 78; on error, Id. 486. See opinion, same case, 9 Best & S. 15; Stratton v. Staples, 59 Me. 94. This principle is recognized in Campbell v. Sugar Co., 62 Me. 552, and in McCarthy v. Bank, 74 Me. 315, 325; Burbank v. Machine Co., 75 Me. 373; Allen v. Smith, 76 Me. 335, 341. See, also, Godley v. Hagerty, 20 Pa. St. 387, affirmed in Carson v. Godley, 26 Pa. St. 111, where buildings were let to the government as bonded warehouses, and, being defectively built and of insufficient strength, they fell by reason of storage of heavy merchandise. So, in Maryland, in Albert v. State, 7 Atl. 697, the court of appeals approved the instruction: "If the jury found that the defendant was the owner of the wharf, and rented it to the tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover." So in Swords v. Edgar, 59 N. Y. 28, the court, after an elaborate review of the cases, held that the lessors of a pier, in the possession of their lessee from whom they received rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon, the cause of the injury being a dangerous defect, which existed at the time of the demise. In a very recent case in Rhode Island, of like facts, the court held both lessor and lessee jointly liable. Joyce v. Martin, 10 Atl. 620. See, also, the recent case in New Jersey, of Rankin v. Ingwersen, 10 Atl. 545; also a Massachusetts case, Dalay v. Savage, 12 N. E. 841.

We are aware that there are a few cases which hold that, even if premises are dangerous when demised, the lessor is not liable to one injured thereby if the tenant in the lease covenanted to keep them in repair. Pretty v. Bickmore, L. R. 8 C. P. 401. And the same principle was subsequently affirmed in a case of very similar facts. Gwinnell v. Eamer, L. R. 10 C. P. 658. See, also, Leonard v. Storer, 115 Mass. 86, where the lessee covenanted to "make all needful and proper repairs, both internal and external." The language of the court, when taken in connection with the facts, is explainable in consonance with the early English cases before cited. See, also, the dictum in the recent case in Massachusetts, already cited, of Dalay v. Savage. But this principle has been ably reviewed in the strong opinion of Fogler, J., in Swords v. Edgar, supra. This opinion declines to accept the doctrine of the above cases, for the reason that they "ignored the rule announced in Rosewell v. Prior, supra, and followed and established in many cases." Fogler, J., speaking for the whole court upon this question, said: "The person injuriously affected by the ruinous state of the premises demised has no right nor privity in the covenant. He is not given thereby a right of action against the lessee, greater nor more sure than he had before. He has the right without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. It is not so that a person, on whom there rests a duty to others, may, by an agreement between himself and a third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill would not; as if, in this case, insufficient repair of the pier had been made by a builder, who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessor, to keep in order and repair, is no more effectual than a contract with a builder to the same end. Both may afford an

indemnity to the lessor, but neither can shield him from responsibility." The New Jersey case of Rankin v. Ingwersen, supra, sustains the same view. And we adopt the doctrine of the case from which we have so largely quoted as sound on legal principles and public policy. And even if a lessee's covenant would, when broad enough in its terms, operate as a relief of the lessor's liability, the covenant here would not affect the case in hand, for it is restricted and limited to "maintaining, preserving, and keeping the station-houses in as good order and repair as the same now are, so that there shall be no depreciation in the general condition thereof at any time during the term."

The testimony as to the proximity of the awnings of the other stations had a legitimate bearing on the question of the exercise of care on the part of the plaintiff; and the defendant pursued the same line of inquiry, not only on cross-examination, but in the direct examination of its own witnesses, Stowell and Winters. We think also that Sawyer's testimony was legitimate. Motion and exceptions overruled.

Cf. Driscoll v. Norwich & Worcester R. R. Co., 65 Conn. 230, 32 Atl. 354.

Probable extent of injury. Expert opinion. Reasonable certainty of resulting damage.

STROHM v. NEW YORK, LAKE ERIE & WESTERN R. R. CO.

(96 N. Y. 305.)

Court of Appeals of New York. June 17, 1884.

Appeal from supreme court, general term, Second department.

Action to recover damages for personal injuries. The facts sufficiently appear in the opinion. There was a judgment for plaintiff. Defendant appealed. Reversed.

B. F. Tracy, for appellant. Samuel Hand, for respondent.

RAPALLO, J. We feel constrained to order a new trial in this case on account of the admission of the evidence of Dr. Spitzka as to the disorders into which the symptoms the plaintiff was said to have exhibited, might develop. Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. Curtis v. Railroad Co., 18 N. Y. 541; Filer v. Railroad Co., 49 N. Y. 45; Clark v. Brown, 18 Wend. 229; Lincoln v. Railroad Co., 23 Wend. 425, 435.

The witness, Dr. Spitzka, had personally examined the physical condition of the plaintiff, had received from him an oral statement of his symptoms, and had also been asked a hypothetical question, embodying a description of the apparent condition and symptoms exhibited by the plaintiff since the injury, as claimed by the plaintiff's counsel to have been established by the evidence. He was then asked what the symptoms related to him and those described in the hypothetical question indicated, and he answered that the elements of the hypothetical question proved epilepsy, while those related by the patient himself left that matter open, leaving it either as a preliminary stage of epilepsy or meningitis or traumatic dementia, the witness could not decide which of the three. Being afterward asked as to the permanency of the condition of the plaintiff, he stated that it was very likely to be permanent. The question was then put to him by the plaintiff's counsel, "What do you mean by 'very likely'?" and he answered, "I mean that the boy will always have some remnants of this injury, some reminder of it, great or small; that is certain; how much he will retain I cannot tell, but I think it very likely he will retain—"

Here the witness was interrupted by an objection of the defendant's counsel to the words "very likely," and what followed, as entirely too speculative. The court overruled the objection, and an exception was taken. The witness then answered that the plaintiff was likely to retain the greater part of the symptoms if he did not develop worse signs. The following question was then put: Q. "You said it might develop into worse signs or conditions. What do you refer to?"

This question was objected to as speculative and hypothetical. The objection was overruled, and the counsel for the defendant excepted, and the witness then answered: "A patient sustaining such injuries and presenting such premonitory signs, may develop traumatic insanity, or meningitis, or progressive dementia, or epilepsy with its results."

This answer was quite responsive to the question asked, which in substance called upon the witness to state what worse signs or conditions might be developed from the injuries sustained by the plaintiff; and the evidence being admitted by the court in the face of the objection that the inquiry was too speculative, the door was opened for the jury, in estimating the damages, to include compensation for the mere hazard to which the plaintiff was claimed to be exposed of being afflicted with the terrible disorders, or some of them, enumerated in the answer. It is impossible to reconcile the admission of this evidence with the authorities before referred to, or to say that the error could not have prejudiced the defendant, or influenced the amount of the verdict.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur, except RUGER, C. J., and DANFORTH, J., who dissent upon the ground that the question is not properly raised, and if it is, that evidence by experts of the probable and even possible consequences of the injury is admissible for the consideration of the jury.

Judgment reversed.

Trial. Practice. Examination of plaintiff's person, to determine injury. Constitutional law. Seventh amendment.

UNION PACIFIC RAILWAY CO. v. BOTSFORD.

(141 U. S. 250, 11 Sup. Ct. 1000.)

Supreme Court of the United States. May 25, 1891.

In error to the circuit court of the United States for the district of Indiana.

The original action was by Clara L. Botsford against the Union Pacific Railway Company for negligence in the construction and care of an upper berth in a sleeping-car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial. Three days before the trial (as appeared by the defendant's bill of exceptions) "the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner, the defendant at the time informing the court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition. The court overruled said motion, and refused to make said order, upon the sole ground that this court had no legal right or power to make and enforce such order." To this ruling and action of the court the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of $10,000, sued out this writ of error.

John F. Dillon, for plaintiff in error. *A. C. Harris*, for defendant in error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the circuit court in holding that it had no legal right or power to make and enforce such an order. No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: "The right to one's person may be said to be a right of complete immunity; to be let alone." Cooley, Torts, 29. For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process or execution for debt, or writ of replevin. 3 Bl. Comm. 8; Sunbolf v. Alford, 3 Mees. & W. 248, 253, 254; Mack v. Parks, 8 Gray, 517; Maxham v. Day, 16 Gray, 213. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. In former times, the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy or of the identity of a party; or, on an appeal of mayhem, the issue of mayhem or no mayhem; and, in an action of trespass for mayhem, or for an atrocious battery, might, after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, *super visum vulneris*, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, "it is not thought necessary to summon a jury to decide it," because "the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragable proof;" and therefore, "the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone." The inspection was not had for the purpose of submitting the result to the jury, but the question was thought too easy of decision to need submission to a jury at all. 3 Bl. Comm. 331–333. The authority of courts of divorce, in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction, and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. Briggs v. Morgan, 2 Hagg. Const. 324, 3 Phillim. Ecc. 325; Devanbagh v. Devanbagh, 5 Paige, 554; Le Barron v. Le Barron, 35 Vt. 365. The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the proper-

ty of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. 1 Bl. Comm. 456; Bac. Abr. "Bastard, A." In cases of that class, the writ has been issued in England in quite recent times. In re Blakemore, 14 Law J. Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history. The most analogous cases in England that have come under our notice are two in the common bench, in each of which an order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it. In one of them, decided in 1838, counsel moved for an order that the plaintiff and his witnesses have a view of the building, and an inspection of the work done thereon; and stated that the object of the motion was to prevent great expense, to obviate the necessity of calling a host of surveyors, and to avoid being considered trespassers. Thereupon one of the judges said, "Then you are asking the court to make an order for you to commit a trespass;" and Chief Justice TINDAL said: "Suppose the defendants keep the door shut; you will come to us to grant an attachment. Could we grant it in such a case? You had better see if you can find any authority to support you, and mention it to the court again." On a subsequent day, the counsel stated that he had not been able to find any case in point, and therefore took nothing by his motion. Newham v. Tate, 1 Arn. 244, 6 Scott, 574. In the other case, in 1840, the court discharged a similar order, saying: "The order, if valid, might, upon disobedience to it, be enforced by attachment. Then it is evidently one which a judge has no power to make. If the party should refuse so reasonable a thing as an inspection, it may be a matter of argument before the jury, but the court has no power to enforce it." Turquand v. Strand Union, 8 Dowl. 201, 4 Jur. 74. In the English common law procedure act of 1854, enlarging the powers which the courts had before, and authorizing them, on the application of either party, to make an order "for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute," the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Tayl. Ev. (6th Ed.) §§ 502–504. Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. Tayl. Ev. §§ 1588–1595; 1 Greenl. Ev. § 559.

In the case at bar, it was argued that the plaintiff in an action for personal injury may be permitted by the court, as in Mulhado v. Railroad, 30 N. Y. 370, to exhibit his wounds to the jury in order to show their nature and extent, and to enable a surgeon to testify on that subject, and therefore may be required by the court to do the same thing, for the same purpose, upon the motion of the defendant. But the answer to this is that any one may expose his body, if he chooses, with a due regard to decency, and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent. If he unreasonably refuses to show his injuries, when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power. Clifton v. U. S., 4 How. 242; Bryant v. Stilwell, 24 Pa. St. 314; Turquand v. Strand Union, above cited. In this country, the earliest instance of an order for the inspection of the body of the plaintiff in an action for a personal injury appears to have been in 1868, by a judge of the superior court of the city of New York in Walsh v. Sayre, 52 How. Pr. 334, since overruled by decisions in general term in the same state. Roberts v. Railroad, 29 Hun, 154; Neuman v. Railroad, 50 N. Y. Super. Ct. 412; McSwyny v. Railroad Co., 7 N. Y. Supp. 456. And the power to make such an order was peremptorily denied in 1873 by the supreme court of Missouri, and in 1882 by the supreme court of Illinois. Loyd v. Railroad Co., 53 Mo. 509; Parker v. Enslow, 102 Ill. 272. Within the last 15 years, indeed, as appears by the cases cited in the brief of the plaintiff in error,[1] a practice to grant such orders has prevailed in the courts of several of the western and southern states, following the lead of the supreme court of Iowa in a case decided in 1877. The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law. In the state of Indiana, the question appears not to be settled. The opinions of its highest court are conflicting and indecisive. Kern v. Bridwell, 119 Ind. 226, 229, 21 N. E. Rep. 664; Hess v. Lowrey, 122 Ind. 225, 233, 23 N. E. Rep. 156; Railroad v. Brunker, (Ind.) 26 N. E. Rep.

[1] Schroeder v. Railway Co., 47 Iowa, 375; Turnpike Co. v. Baily, 37 Ohio St. 104; Railroad Co. v. Thul, 29 Kan. 466; White v. Railway Co., 61 Wis. 536, 21 N. W. Rep. 524; Hatfield v. Railroad Co., 33 Minn. 130, 22 N. W. Rep. 176; Stuart v. Havens, 17 Neb. 211, 22 N. W. Rep. 419; Owens v. Railroad Co., 95 Mo. 169, 8 S. W. Rep. 350; Sibley v. Smith, 46 Ark. 275; Railroad Co. v. Johnson, 72 Tex. 95, 10 S. W. Rep. 325; Railroad Co. v. Childress, 82 Ga. 719, 9 S. E. Rep. 602; Railroad Co. v. Hill, 90 Ala. 71, 8 South. Rep. 90.

178. And the only statute which could be supposed to bear upon the question simply authorizes the court to order a view of real or personal property which is the subject of litigation, or of the place in which any material fact occurred. Rev. St. Ind. 1881, c. 2, § 538.

But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts, under the constitution and laws of the United States. The constitution, in the seventh amendment, declares that in all suits at common law, where the value in controversy shall exceed $20, trial by jury shall be preserved. Congress has enacted that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," and has then made special provision, for taking depositions. Rev. St. §§ 861, 863 et seq. The only power of discovery or inspection conferred by congress is to "require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," and to nonsuit or default a party failing to comply with such an order. Rev. St. § 724. And the provision of section 914, by which the practice, pleadings, and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court. Nudd v. Burrows, 91 U. S. 426, 442; Railroad Co. v. Horst, 93 U. S. 291, 300; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724; Chateaugay Ore & Iron Co., 128 U. S. 544, 554, 9 Sup. Ct. Rep. 150. In Ex parte Fisk, just cited, the question was whether a statute of New York, permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial, was applicable after an action begun in a court of the state had been removed into the circuit court of the United States. It was argued that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York. 113 U. S. 717, 5 Sup Ct. Rep. 724. But this court, speaking by Mr. Justice MILLER, held that this was a matter of evidence, and governed by that section, saying: "Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof." "It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel, to extract something which he may use or not as it suits his purpose." "Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides. There is no place for exceptions made by state statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this." 113 U. S. 724, 5 Sup. Ct. Rep. 724. So we say here. The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States. The circuit court, to adopt the words of Mr. Justice MILLER, "has no power to subject a party to such an examination as this."

Judgment affirmed.

BREWER, J. (dissenting). Mr. Justice BROWN and myself dissent from the foregoing opinion. The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few of those difficult questions, as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common-law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seemed to require such an examination, it was ordered. The instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange that, if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various states are conflicting. This is the first time it has been presented to this court, and it is therefore an open question. There is here no inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or rudeness, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the court-room, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange

that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but, when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries, in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial or dismissing the case. For these reasons we dissent.

Contributory negligence of hack driver. **Master and servant.**

LITTLE v. HACKETT.

(116 U. S. 366, 6 Sup. Ct. 391.)

Supreme Court of the United States. Jan. 4, 1886.

In error to the circuit court of the United States for the district of New Jersey.

Robt. W. De Forest and F. L. Hall, for plaintiff in error. Robert H. Hinckley and Peter L. Voorhies, for defendant in error.

FIELD, J. On the 28th of June, 1879, the plaintiff below, defendant in error here, was injured by the collision of a train of the Central Railroad Company of New Jersey with a carriage in which he was riding; and this action is brought to recover damages for the injury. The railroad was at the time operated by a receiver of the company appointed by order of the court of chancery of New Jersey. In consequence of his death, the defendant was appointed by the court his successor, and subjected to his liabilities; and this action is prosecuted by its permission.

It appears from the record that on the day mentioned the plaintiff went on an excursion from Germantown, in Pennsylvania, to Long Branch, in New Jersey, with an association of which he was a member. While there, he dined at the West End Hotel, and after dinner hired a public hackney-coach from a stand near the hotel, and, taking a companion with him, was driven along the beach to the pier, where a steam-boat was landing its passengers, and thence to the railroad station at the West End. On arriving there he found he had time, before the train left, to take a further drive, and directed the driver to go through Hoey's Park, which was near by. The driver thereupon turned the horses to go to the park, and, in crossing the railroad track near the station for that purpose, the carriage was struck by the engine of a passing train, and the plaintiff received the injury complained of. The carriage belonged to a livery-stable keeper, and was driven by a person in his employ. It was an open carriage, with the seat of the driver about two feet above that of the persons riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage,—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track; the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train, and of the driver of the carriage, to the jury, and no exception is taken to its instructions on this head. But with reference to the alleged imputed negligence of the plaintiff, assuming that the driver was negligent, the court instructed them that unless the plaintiff interfered with the driver, and controlled the manner of his driving, his negligence could not be imputed to the plaintiff.

"I charge you," said the presiding judge to them, "that where a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another, he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding, or of the driver of the other. He may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time." "The passenger in the carriage may direct the driver where to go,—to such a park or to such a place that he wishes to see. So far the driver is under his direction; but my charge to you is that, as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of it, and has charge of the team—is the person responsible for the manner of driving, and the passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements. If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot-passengers or to anybody else, why then he might be liable, because it was by his own command and direction that it was done; but, ordinarily in a public hack, the passengers do not control the driver, and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference."

The plaintiff recovered judgment, and this instruction is alleged as error, for which its reversal is sought.

That one cannot recover damages for an injury to the commission of which he has directly contributed, is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as

sound,—that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrongdoer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child or guardian and ward, and the like. Such a relation involves considerations which have no bearing upon the question before us.

To determine, therefore, the correctness of the instruction of the court below—to the effect that if the plaintiff did not exercise control over the conduct of the driver at the time of the accident, he is not responsible for the driver's negligence, nor precluded thereby from recovering in the action—we have only to consider whether the relation of master and servant existed between them. Plainly, that relation did not exist. The driver was the servant of his employer, the livery-stable keeper, who hired out him, with horse and carriage, and was responsible for his acts. Upon this point we have a decision of the court of exchequer in Quarman v. Burnett, 6 Mees. & W. 499. In that case it appeared that the owners of a chariot were in the habit of hiring, for a day or a drive, horses and a coachman from a job-mistress, for which she charged and received a certain sum. She paid the driver by the week, and the owners of the chariot gave him a gratuity for each day's service. On one occasion he left the horses unattended, and they ran off, and against the chaise of the plaintiff, seriously injuring him and the chaise, and he brought an action against the owners of the chariot, and obtained a verdict; but it was set aside on the ground that the coachman was the servant of the job-mistress, who was responsible for his negligence. In giving the opinion of the court, Baron Parke said: "It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the negligence of the servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct; as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at any particular moment, and the like." As none of these circumstances existed, it was held that the defendants were not liable, because the relation of master and servant between them and the driver did not exist. This doctrine was approved and applied by the queen's bench division, in the recent case of Jones v. Corporation of Liverpool, 14 Q. B. Div. 890. The corporation owned a water-cart, and contracted with a Mrs. Dean for a horse and driver, that it might be used in watering the streets. The horse belonged to her, and the driver she employed was not under the control of the corporation otherwise than its inspector directed him what streets or portions of streets to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart, and, in an action against the corporation for the injury, he recovered a verdict, which was set aside upon the ground that the driver was the servant of Mrs. Dean, who had hired both him and the horse to the corporation. In this country there are many decisions of courts of the highest character to the same effect, to some of which we shall presently refer.

The doctrine, resting upon the principle that no one is to be denied a remedy for injuries sustained, without fault by him, or by a party under his control and direction, is qualified by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrong-doer when they who are in charge can recover; in other words, that their contributory negligence is imputable to him, so as to preclude his recovery for an injury when they, by reason of such negligence, could not recover. The leading case to this effect is Thorogood v. Bryan, decided by the court of common pleas in 1849. 8 C. B. 115. It there appeared that the husband of the plaintiff, whose administratrix she was, was a passenger in an omnibus. The defendant, Mrs. Bryan, was the proprietress of another omnibus, running on the same line of road. Both vehicles had started together, and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up to the curb, but got out while it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, he was run over, and in a few days afterwards died from the injuries sustained. The court, among other things, instructed the jury that if they were of the opinion that want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put him down, had been conducive to the injury, the verdict must be for the defendant, although her driver was also guilty of negligence. The jury found for the defendant, and the court discharged a rule for a new trial, for misdirection, thus sustaining the instruction. The grounds of its decision were, as stated by Mr. Justice Coltman, that the deceased, having trusted the party by selecting the particular conveyance in which he was carried, had so far identified

himself with the owner and her servants that if an injury resulted from their negligence, he must be considered a party to it; "in other words," to quote his language, "the passenger is so far identified with the carriage in which he is traveling that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury." Mr. Justice Maule, in the same case, said that the passenger "chose his own conveyance, and must take the consequences of any default of the driver he thought fit to trust." Mr. Justice Cresswell said: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action, and I must confess I see no reason why a passenger, who employs the driver to carry him, stands in any different position." Mr. Justice Williams added that he was of the same opinion. He said: "I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed in."

What is meant by the passenger being "identified with the carriage," or "with the person having its management," is not very clear. In a recent case, in which the court of exchequer applied the same test to a passenger in a railway train which collided with a number of loaded wagons that were being shunted from a siding by the defendant, another railway company, Baron Pollock said that he understood it to mean "that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." Armstrong v. Lancashire & Y. Ry. Co., L. R. 10 Exch. 47, 52. Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position, with reference to the negligent act, as the driver who committed it, or as his master, the owner. Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him, equally with them, responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained. Neither has the support of any adjudged cases entitled to consideration.

The truth is the decision in Thorogood v. Bryan rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world. Thorogood v. Bryan has not escaped criticism in the English courts. In the court of admiralty it has been openly disregarded. In The Milan, Dr. Lushington, the judge of the high court of admiralty, in speaking of that case, said: "With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly against Hay v. La Neve [2 Shaw, 395] and the ordinary practice of the court of admiralty." Lush. 388, 403.

In this country the doctrine of Thorogood v. Bryan has not been generally followed. In Bennet v. Transportation Co., 36 N. J. Law, 225, and Railroad Co. v. Steinbrener, 47 N. J. Law, 161, it was elaborately examined by the supreme court and the court of errors of New Jersey, in opinions of marked ability and learning, and was disapproved and rejected. In the first case it was held that the driver of a horse car was not the agent of the passenger so as to render the passenger chargeable for the driver's negligence. The car, in crossing the track of the railroad company, was struck by its train, and the passenger was injured, and he brought an action against the company. On the trial the defendant contended that there was evidence tending to show negligence by the driver of the horse car, which was in part productive of the accident, and the presiding judge was requested to charge the jury that if this was so, the plaintiff was not entitled to recover; but the court instructed them that the carelessness of the driver would not affect the action, or bar the plaintiff's right to recover for the negligence of the defendant. And this instruction was sustained by the court. In speaking of the "identification" of the passenger in the omnibus with the driver, mentioned in Thorogood v. Bryan, the court, by the chief justice, said: "Such identification could result only in one way; that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle; and it is this right to control the conduct of the agent which is the foundation of the doctrine that

the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency; and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was the passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes." 36 N. J. Law, 227, 228.

In the latter case it appeared that the plaintiff had hired a coach and horses, with a driver, to take his family on a particular journey. In the course of the journey, while crossing the track of the railroad, the coach was struck by a passing train, and the plaintiff was injured. In an action brought by him against the railroad company, it was held that the relation of master and servant did not exist between him and the driver, and that the negligence of the latter, cooperating with that of persons in charge of the train, which caused the accident, was not imputable to the plaintiff, as contributory negligence, to bar his action.

In New York a similar conclusion has been reached. In Chapman v. New Haven R. Co., 19 N. Y. 341, it appeared that there was a collision between the trains of two railroad companies, by which the plaintiff, a passenger in one of them, was injured. The court of appeals of that state held that a passenger by railroad was not so identified with the proprietors of the train conveying him, or with their servants, as to be responsible for their negligence, and that he might recover against the proprietors of another train for injuries sustained from a collision through their negligence, although there was such negligence in the management of the train conveying him as would have defeated an action by its owners. In giving the decision, the court referred to Thorogood v. Bryan, and said that it could see no justice in the doctrine in connection with that case, and that to attribute to the passenger the negligence of the agents of the company, and thus bar his right to recover, was not applying any existing exception to the general rule of law, but was framing a new exception based on fiction and inconsistent with justice. The case differed from Thorogood v. Bryan in that the vehicle carrying the plaintiff was a railway train instead of an omnibus; but the doctrine of the English case, if sound, is as applicable to passengers on railway trains as to passengers in an omnibus; and it was so applied, as already stated, by the court of exchequer in the recent case of Armstrong v. Railroad Co.

In Dyer v. Railway Co., 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing, without giving the driver of the wagon any warning of its approach. The horses, becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown or jumped from the wagon, and was injured by the train which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and, although he traveled voluntarily, he was not responsible for the negligence of the driver, where he himself was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses.

A similar doctrine is maintained by the courts of Ohio. In Transfer Co. v. Kelly, 36 Ohio St. 86, the plaintiff, a passenger on a car owned by a street railroad company, was injured by its collision with a car of the transfer company. There was evidence tending to show that both companies were negligent, but the court held that the plaintiff, he not being in fault, could recover against the transfer company, and that the concurrent negligence of the company on whose cars he was a passenger could not be imputed to him, so as to charge him with contributory negligence. The chief justice, in delivering the opinion of the court, said: "It seems to us that the negligence of the company, or of its servant, should not be imputed to the passenger, where such negligence contributed to his injury jointly with the negligence of a third party, any more than it should be so imputed where the negligence of the company, or its servant, was the sole cause of the injury." "Indeed," the chief justice added, "it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury caused directly or proximately by the latter's negligence should be denied, on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier whereby an injury was inflicted upon a stranger. And of the last proposition it is enough to say that it is simply absurd."

In the supreme court of Illinois the same doctrine is maintained. In the recent case of Wabash, St. L. & P. R. Co. v. Shack-

let, 105 Ill. 364, the doctrine of Thorogood's Case was examined and rejected; the court holding that where a passenger on a railway train is injured by the concurring negligence of servants of the company on whose train he is traveling, and of the servants of another company with whom he has not contracted, there being no fault or negligence on his part, he or his personal representatives may maintain an action against either company in default, and will not be restricted to an action against the company on whose train he was traveling.

Similar decisions have been made in the courts of Kentucky, Michigan, and California. Road Co. v. Stewart, 2 Metc. (Ky.) 119; Railroad Co. v. Case, 9 Bush, 728; Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32; Tompkins v. Railroad Co., 4 Pac. 1165.

There is no distinction in principle whether the passengers be on a public conveyance, like a railroad train or an omnibus, or be on a hack hired from a public stand, in the street, for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent, so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. "If the law were otherwise," as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, "not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box, and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach-stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried." 47 N. J. Law, 171.

In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver further than to indicate the places to which he wished him to drive. The instruction of the court below, that unless he did exercise such control, and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him, so as to bar his right of action against the defendant, was therefore correct, and the judgment must be affirmed; and it is so ordered.

Cf. Masterson v. New York Central & Hudson River R. R. Co. (1881) 84 N. Y. 247.

Elements of negligence. Question of duty. Standard of duty when a question of law.

FARRELL v. WATERBURY HORSE RAILROAD CO.

(60 Conn. 239, 21 Atl. 675.)

Supreme Court of Errors of Connecticut. March 20, 1891.

Appeal from district court of Waterbury; Cowell, Judge.

J. O'Neill, for appellant. G. E. Terry, for appellee.

TORRANCE, J. This is an action brought to recover damages for an injury caused to the plaintiff by the negligence of the defendant in the management of one of its horse-cars on a public highway. The case was defaulted and heard in damages. The court below made a finding of the subordinate and evidential facts, bearing upon the question of the negligence of the defendant, and the contributory negligence of the plaintiff, and then added the following: "I find that the defendant was not negligent in running the car in the manner above described, unless the foregoing facts constitute negligence. On the foregoing facts, however, I find that the plaintiff was guilty of contributory negligence, and therefore assess to him seventy-five dollars only, as nominal damages. If the plaintiff was not in the above-recited facts guilty of contributory negligence, his injuries were of such a character that he should recover sixfold the assessed damages." Upon the trial below the plaintiff made certain claims upon matters of law, which are set forth in the record. Four of the six reasons of appeal filed in this case are based upon the assumed fact that the court below decided these claims adversely to the plaintiff. But the record neither expressly, nor by necessary implication, discloses any such fact. For aught that appears, the court below took the view of the law, as expressed in these claims, which the plaintiff asked it to take. This court, upon an appeal, cannot consider any error assigned in the reasons of appeal, unless "it also appears upon the record that the question was distinctly raised at the trial, and was decided by the court adversely to the appellant's claims." Gen. St. § 1135. We cannot, therefore, consider the matters set forth in the last four reasons of appeal.

This leaves to be considered only the first two reasons of appeal, which are stated as follows: "(1) The court erred in deciding that the defendant, on the facts found, was not negligent. (2) In deciding that the plaintiff was guilty of contributory negligence."

The plaintiff claims that the conclusions of the trial court upon the facts found, as to the negligence of the defendant, and the contributory negligence of the plaintiff, are inferences or conclusions of law, which may be reviewed by this court upon an appeal, and the defendant claims that they are inferences or conclusions of fact, which cannot be so reviewed. If the plaintiff is right in his claim, this court can and ought to review the conclusions aforesaid. If the defendant is right, there is, properly, no question presented upon the record for the consideration of this court. Whether, in a given case involving the question of negligence of either the plaintiff or defendant, the conclusion or inference of negligence drawn by the trier or triers is one which this court has or has not the power to review, is always an important, and often a difficult, question to determine. Its importance arises from the fact that in the former case such conclusion may, upon review, be either sustained or set aside by this court; while in the latter case such conclusion, whether drawn correctly or not, is, generally speaking, final and conclusive. The difficulty of determining whether the conclusion belongs to one or the other of these classes arises, in part at least, from the complex nature of negligence, as a legal conception, and the fact that the word "negligence" is frequently used for only a part of this complex conception. "Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world) which the law attaches to those facts, the former imports the existence of certain facts, (conduct,) and also the consequence (liability) which the law attaches to those facts." Holmes, Com. Law, p. 115. This conception involves, as its main elements, the subordinate conceptions of a duty resting upon one person, respecting his conduct towards others, a violation of such duty, through heedlessness or inattention on the part of him on whom it rests; a resulting legal injury or harm to others as an effect; and the legal liability consequent thereon. Accordingly, as a legal conception, "negligence" has been defined as follows: "A breach of duty, unintentional, and proximately producing injury to another possessing equal rights." Smith, Neg. p. 1. But neither in text-books, nor in judicial decisions, is the word "negligence" used at all times as standing for all the elements of this entire complex conception. When, in courts of law, the principal question is, what was the conduct? it is customary, and perhaps allowable, to say that the question of negligence is one of fact, to be determined by the trier, and, when the question principally respects the duty or the liability, to say that it is a question of law. When, therefore, in text-books, or in adjudged cases, the assertion is made that the "question of negligence" is a "question of fact," or is a "question of law," or is a "mixed question of law and of fact," no confusion of thought will result, if the sense in which the word "negligence" is used in the particular instance be ascertained, and this, in most cases, may be readily determined from the context.

But another, and perhaps the chief, cause of the difficulty of determining, in a given case, whether the conclusion as to negligence is one of law or of fact, arises from another source, which we will now consider. The conception of negligence, as we have seen, involves the idea of a duty to act in a certain way towards others, and a violation of that duty by acts or conduct of a contrary nature. The duty is imposed by law, either directly by

establishing specific or general rules of conduct binding upon all persons, or indirectly, through legal agreements, made by the parties concerned. It is with duties not arising out of contract that we are here concerned. There is further involved, in the legal conception of negligence, the existence of a test or standard of conduct, with which the given conduct is to be compared, and by which it is to be judged. The question whether the given conduct comes up to the standard is frequently called the question of negligence. The result of comparing the conduct with the standard is generally spoken of as "negligence," or "the finding of negligence." Negligence, in this last sense, is always a conclusion or inference, and never a "fact," in the ordinary sense of that word. When the question of negligence, in the above sense, can be answered by the court, it is called a question of law, and the answer is called an inference or conclusion of law; when it is and must be answered by a jury or other trier, it is generally called a question of fact, and the answer is called an inference or conclusion of fact. Where the law itself prescribes and defines beforehand the precise specific conduct required, under given circumstances, the standard by which such conduct is to be judged is found in the law. When, in such a case, the conduct has been ascertained, the law, through the court, determines whether the conduct comes up to the standard. The rules of the road, some of the rules of navigation, and the law requiring the sounding of the whistle or the ringing of the bell of a locomotive approaching a grade crossing, at a specified distance therefrom, may serve as instances of this kind. Of course, if, in cases of this kind, one of the parties injures another, he is not necessarily absolved from blame, by showing a compliance with the specific rule of law, for it may be that while so doing he neglected other duties which the law imposed upon him. But when the only question is whether the ascertained conduct comes up to the standard fixed by the specific rule or law, the conclusion, inference, or judgment that it does or does not is, as we have said, one of law. A question of law, in the true sense, is one that can be decided by the application, to the specific facts found to exist, (here the conduct of some person, and the circumstances under which he acted or omitted to act,) of a pre-existing rule. Such a rule must contain a description of the kind of circumstances to which it is to apply, and the kind of conduct required. Terry, Anglo-Amer. Law, par. 72.

In such cases, as this court said in substance in Hayden v Allyn, 55 Conn. 289, 11 Atl. Rep. 31, the evidence exhausts itself in producing the facts found. Nothing remains but for the court, in the exercise of its legal discretion, to draw the inference of liability or non-liability, and this inference or conclusion can, in such cases, always be reviewed by this court. Clear cases of this kind usually present no difficulty. As applicable to most cases, however, the law has not provided specific and precise rules of conduct; it contents itself with laying down some few wide, general rules. The rule that all persons must act and conduct themselves, under all circumstances, as a man of ordinary prudence would act, under like circumstances, is an illustration of this class of rules of laws. This general rule of conduct is not a standard of conduct, in the same sense in which a fixed rule of law is such a standard. In most cases, where it must be applied, the principal controversy is over the question, what would have been the conduct of a man of ordinary prudence, under the circumstances? Manifestly the rule itself can furnish no answer to that question in such cases. "The rule usually propounded, to act as a reasonable and prudent man would act in the circumstances, still leaves open the question how such a man would act." Id. It is also a varying standard. "In dangerous situations, ordinary care means great care; the greater the danger the greater the care required; and the want of the degree of care required may amount to culpable negligence." Knowles v. Crampton, 55 Conn. 344, 11 Atl. Rep. 593. This general rule has rightly been called "a featureless generality," but, from the necessity of the case, it is the only rule of law applicable in the great majority of cases involving the question of negligence. The law cannot say beforehand how the man of ordinary prudence would act, or ought to act, under all or any probable set of circumstances. But in cases involving the question of negligence, where this general rule of conduct is the only rule of law applicable, it may, and sometimes does, happen that the conduct under investigation is so manifestly contrary to that of a reasonably prudent man, or is so plainly and palpably like that of such a man, that the general rule itself may be applied as a matter of law, by the court, without the aid of a jury; that is, the conduct may be such that no court could hesitate or be in doubt concerning the question whether the conduct was or was not the conduct of a person of ordinary prudence, under the circumstances.

The difference between the classes of cases where the court can thus apply the general rule of conduct, and those wherein it must be applied by the jury, is well illustrated in the following extract from the opinion of the supreme court of the United States in the case of Railroad Co. v. Stout, 17 Wall. 657: "If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled, as a question of law, that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these inter-

mediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of sound judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another equally sensible and equally impartial man would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury." The line of division between these two classes of cases is by no means a fixed and well-defined one. Close cases will occur where courts may well differ in opinion as to whether they lie on one side or on the other of the boundary line. "Legal, like natural, divisions, however clear in their general outline, will be found, on exact scrutiny, to end in a penumbra or debatable land." Holmes, Com. Law p. 127. Now, the difficulty of determining whether a conclusion or inference of negligence is one "of fact" or one "of law," as these phrases are commonly used, arises mainly in this intermediate class of cases. In such cases, the law itself furnishes no certain, specific, sufficient standard of conduct, and, of necessity, leaves the trier to determine, both what the conduct is, and whether it comes up to the standard, as such standard exists in the mind of the trier. In a case of this kind, the inference or conclusion of the trier, upon the question whether the ascertained conduct does or does not come up to such standard, is, as we have said, called a "question of fact," and, generally speaking, it cannot be reviewed by this court. If such inference is drawn by a jury, it is final and conclusive, because their opinion of what a man of ordinary prudence would or would not do, under the circumstances, is the rule of decision in that special case. If drawn by a single trier, as it may be, under our system of law, it is equally final and conclusive for the same reason. In every such case, the trier, for the time being, adopts his own opinion, limited only by the general rule of what the man of ordinary prudence would or would not do, under the circumstances, and makes such opinion the measure or standard of the conduct in question. This view of the subject is forcibly put by COOLEY, J., in the case of Railroad Co. v. Van Steinburg, 17 Mich. 99, wherein he says: "When the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measures the plaintiff's conduct by that. He thus makes his own opinion of what the prudent man would do a definite rule of law." And, in speaking of this same matter, the supreme court of Pennsylvania uses the following language: "When the standard shifts with the circumstances of the case, it is, in its very nature, incapable of being determined as a matter of law, and must be submitted to the jury. There are, it is true, some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Such was this case. The question was not, alone, what the defendants had done or left undone; but, in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve." And later on, in the same opinion, in commenting upon a case cited by the plaintiff, the court says: "Even if the court might, in that case, have declared the effect of the evidence, it must have been because the duty of the defendants was unvarying, and well defined by the law. Here the standard of duty was to be found as a fact, as well as the measure of its performance." McCully v. Clark, 40 Pa. St. 399. In his book on the common law, Judge HOLMES speaks as follows: "When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men, taken from the practical part of the community, can aid its judgment." Holmes, Com. Law, p. 123.

In treating of contributory negligence, Mr. Beach, in his work on that subject, says: "In the ultimate determination of the question whether the plaintiff was guilty of contributory negligence, two separate inquiries are involved: *First*, what was ordinary care, under the circumstances? *Second*, did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care, it is not always a fixed standard. In many cases it must be found by the jury. In such a case, each of these inquiries is for the jury. They must assume a standard, and then measure the plaintiff's conduct by that standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law, and a matter with which the jury can properly have nothing to do." Beach, Contrib. Neg. p. 459, § 163. The distinction between these two classes of cases is a fundamental one, and not one of mere form. It is sometimes said that, where all the facts are found, the mode of stating the inference or conclusion of negligence will make it one of law or fact, as the case may be. But this clearly is not so. No mere mode of statement, whether found in a special verdict or in a special plea, or in a finding of facts, can convert the one into the other. In Beers v. Rail-

road Co., 19 Conn. 566, this court said: "If it were competent for the defendants to have availed themselves of a want of ordinary and reasonable care on the part of the plaintiff by a special plea, and that plea should allege merely the facts or circumstances on which the defendant claims that the court should have declared to the jury that such want of care was proved, or if they had been found in a special verdict by the jury, it is quite clear that such plea or verdict would be unavailable to the defendants on the question, for the reason that the one would allege and the other would find only evidence of the fact in issue, and not the fact itself." In Williams v. Clinton, 28 Conn. 264, this court said: "Under the pleadings, the issue presented nothing but a question of fact,—was there or not culpable negligence on her part? We cannot permit such a question to be taken from the jury, the legal and constitutional tribunal, by the defendants specially reciting the evidence adduced on the trial, and claiming that the court shall instruct them as to its legal effect. Such a course would speedily put an end to all jury trials." In Fiske v. Bleaching Co., 57 Conn. 119, 17 Atl. Rep. 356, this court said: "The only error assigned in this case is that the court below held that, 'upon the facts found, the defendants were guilty of negligence in leaving their horses unhitched and unattended, in the manner described.' The finding of the court states all the facts with great particularity. * * * But the question of negligence cannot thus be made a question of law." In the following cases the findings of facts were substantially similar in form to the finding of facts in the case at bar, yet this court held, and rightly, that it had no power to review the conclusion as to negligence. Daniels v. Saybrook, 34 Conn. 377; Congdon v. Norwich, 37 Conn. 414; Young v. New Haven, 39 Conn. 435; Brennan v. Railroad Co., 45 Conn. 284; Davis v. Town of Guilford, 55 Conn. 356, 11 Atl. Rep. 350. On the other hand, where special findings of fact were made, and from those facts the trial court formally drew the conclusion as to negligence, this court, notwithstanding the form of the finding, held the conclusions to be conclusions of law, and reviewed them. Beardsley v. Hartford, 50 Conn. 529; Nolan v Railroad Co., 53 Conn. 461, 4 Atl. Rep. 106; Bailey v. Railroad Co., 56 Conn. 444, 16 Atl. Rep. 234; Dyson v. Railroad Co., 57 Conn. 9, 17 Atl. Rep. 137.

It is frequently supposed or assumed that it makes some difference in this matter whether the case is tried to the jury or to the court, but this is not so. Whether the trier is one man or twelve men makes no difference. If the case is such that the trier, and not the law, must determine whether the conduct in question is or is not that of the prudent man, the conclusion of the single trier upon this point is just as binding and final as that of twelve men. In Shelton v. Hoadley, 15 Conn. 535, this court held that where an issue of fact is closed to the court, instead of to the jury, the conclusion of the court cannot be reviewed upon a bill of exceptions, which sets out all the facts, any more than the verdict of a jury could be in like circumstances. And in Brady v. Barnes, 42 Conn. 512, it is said: "When an issue of fact is closed and tried by the superior court, this court will not, upon evidence reported, assume the responsibility of finding, by inference therefrom, a fact which that court could not find. The principles and the reasons which protect the sovereignty of juries over facts, when issues are closed to them, underlie this right of auditors and committees in chancery; for they are but statutory juries finding facts by forms of procedure peculiar to themselves." So, also, in Stannard v. Sperry, 56 Conn. 541,[1] it is said: "Under our system, whenever the court, or a committee of its appointment, finds a fact, such finding is beyond revision or correction, equally with the verdict of a jury, if there be no illegality in the mode of proceeding, and no intentional wrong done. Errors of judgment as to the value of property must stand uncorrected. This is equally true of the finding of a committee appointed to hear and find in place of and for the court. If its finding of facts is to be reviewed in every case by the court, its hearing becomes a useless expenditure of labor and money." It may be said that this view of the subject leaves the parties at the mercy of the trier. A like objection, taken in the case last above cited, was thus answered in the opinion: "The defendant suggests that, if this be so, he is at the mercy of the committee, as to the value of his part. But this fact does not vitiate the proceeding. That every person shall be at the mercy of some tribunal, both as to law and fact, is the only reason for the existence of a judicial system."

The distinction in question, then, being in general a fundamental and important distinction, the question remains whether any general rule exists, the application of which will determine in every case, with certainty, whether the inference as to negligence to be drawn from ascertained facts is one of fact or of law, in the sense explained. Perhaps no such general rule has been or can be formulated. At any rate, we know of none, and we do not intend in the present case to lay down any such general rule. But cases involving the distinction in question have been frequently before the courts; they have been decided upon principles which have been, to some extent, formulated into working rules; and these rules can be applied with reasonable certainty in most cases that arise in actual practice. In his work on Torts, Judge Cooley states such a rule as follows: "The proper conclusion seems to be this: If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute." Cooley, Torts, p. 670. In the case of Railroad Co. v Van Steinburg, supra, Judge COOLEY stated the rule as follows: "It is a mistake to say, as is sometimes said, that, when the facts are

[1] 16 Atl. 261.

undisputed, the question of negligence is necessarily one of law. This is generally true only of that class of cases, where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences must either be certain or uncontrovertible, or they cannot be decided by the court." Wharton says: "The true position is this: Negligence is always a logical inference, to be drawn by the jury from all the circumstances of the case, under the instructions of the court. In all cases in which the evidence is such as not to justify the inference of negligence, so that a verdict of a jury would be set aside by the court, then it is the duty of the court to negative the inference. In all other cases the question is for the jury, subject to such advice as may be given by the court as to the force of the inference." Whart. Neg. § 420. The rule laid down by Judge COOLEY is substantially like the one adopted by the supreme court of the United States in the case of Railroad Co. v. Stout, supra. The rule is thus stated in Terry, Anglo-Amer. Law, par. 72: "The question, was the specific conduct of the specific person, in the specific circumstances, reasonable or not? must usually remain as a question which is really one of fact. When the reasonableness or unreasonableness of the conduct is very plain, the court will decide it. When it seems to the court fairly to admit of doubt, it will be handed over to the jury." Mr. Beach, in his work on Contributory Negligence, p. 454, states the rule as follows: "When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law." In Ochsenbein v. Shapley, 85 N. Y. 214, the court stated the rule thus: "When the facts are undisputed, and do not admit of different or contrary inferences, the question is one of law for the court." This also substantially appears to be the rule in Ohio and California. Railroad Co. v. Crawford, 24 Ohio St. 631, McKeever v. Railroad Co., 59 Cal. 294. It is perhaps unnecessary to say that, in making the foregoing citations from text-writers and decisions, we do not necessarily adopt or approve of all their conclusions, or the rule precisely as stated by them; but we think some of the principles stated, upon which the rules are or profess to be based, will furnish a practical guide for the solution of the question we are considering, in cases like the one at bar. Manifestly this frequently recurring question ought to be decided upon principle, so far as it is possible to do so.

We think an examination of the cases from our own reports, heretofore cited, and of others therefrom, that might be cited, involving the question of negligence, will show that this court, in such decisions, has applied principles which, in most cases occurring in practice, will solve the question under consideration without much difficulty. From such an examination, we think it will appear that, in cases involving the question of negligence, where the general rule of conduct is alone applicable; where the facts found are of such a nature that the trier must, as it were, put himself in the place of the parties, and must exercise a sound discretion, based upon his experience, not only upon the question what did the parties do or omit, under the circumstances? but upon the further question, what would a prudent, reasonable man have done under those circumstances? and especially where the facts and circumstances are of such a nature that honest, fair-minded, capable men might come to different conclusions upon the latter question,—the inference or conclusion of negligence is one to be drawn by the trier, and not by the court as matter of law. Such an inference or conclusion will, speaking generally, be treated by this court as one of fact, which will not be reviewed where the facts have been properly found, unless the court can see from the record that in drawing such inference the trier imposed some duty upon the parties which the law did not impose, or absolved them from some duty which the law required of them under the circumstances, or in some other respect violated some rule or principle of law. Of course, we do not here mean to say that this court cannot review such a conclusion upon an appeal from a verdict against evidence, or that it may or may not do so upon a reservation or other proceeding of a like nature. We only mean to say that, in cases where it is the province of the trier to draw the inference of negligence, and no error of law in the sense explained is apparent on the record, error cannot be predicated of the mere act of the trier in drawing what is supposed to be an incorrect or wrong inference from facts properly found. We think these principles can be applied to the case at bar, and that they are decisive of it.

The principal facts are correctly found. They are somewhat numerous, and the question of the negligence of either party is complicated with questions as to the conduct of others, and with the special facts and circumstances of the case of which the conduct forms a part. Under the facts found, the only rule applicable was the general rule of conduct. The facts and circumstances are, we think, clearly of such a nature that a trier must, of necessity, measure the prudence of the parties' conduct by a standard of behavior which he himself adopts for that case, based upon his opinion of the manner in which a man of ordinary prudence would act, under the same circumstances. The problem involved in such an inquiry can only be solved by the trier placing himself in the position of the parties, and, in the light of his experience of human affairs, examining all the facts and circumstances as they appeared to them at the time. Furthermore, we think the facts found are of such a nature that men equally honest and impartial might, and probably would, from them draw different and opposite inferences as to whether due care was or

was not exercised by each party, under the circumstances. It is not apparent upon the record that the court, in arriving at the conclusions, as to negligence, in the case at bar, imposed upon either party the performance of any duty which the law did not impose, nor that it did not require of them the performance of any duty which the law did require, nor that, in any other respect, it violated any rule or principle of law. For these reasons we think the case at bar comes within the class of cases where the conclusions of the trier, both as to negligence and contributory negligence, are regarded as conclusions of fact, which this court cannot review. There is no error apparent upon the record. The other judges concur.

Infant. Imputable negligence.

NEWMAN v. PHILLIPSBURGH HORSE-CAR R. R. CO.

(52 N. J. Law, 446, 19 Atl. 1102.)

Supreme Court of New Jersey. June 5, 1890.

Case certified from circuit court, Warren county; before Chief Justice Beasley.

The plaintiff was a child 2 years of age. She was in the custody of her sister, who was 22. The former, being left by herself for a few minutes, got upon the railroad track of the defendant, and was hurt by the car. The occurrence took place in a public street of the village of Phillipsburgh. The carelessness of the defendant was manifest, as at the time of the accident there was no one in charge of the horse drawing the car; the driver being in the car, collecting fares. The circuit judge submitted the three following propositions to this court for its advisory opinion, viz.: "First, whether the negligence of the persons in charge of the plaintiff, an infant minor, should be imputed to the said plaintiff; second, whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of was not so demonstrably negligent that the said circuit court should have nonsuited the plaintiff; or that the court should have directed the jury to find for the defendant; third, whether a new trial ought not to be granted on the grounnd that the damages awarded are excessive."

Argned November term, 1889.

Shipman & Son, for plaintiff. William H. Morrow, for defendant.

BEASLEY, C. J., (after stating the facts as above.) There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law. The problem is whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in Hartfield v. Roper, reported in 21 Wend. 615. This case appears to have been one of first impression on this subject; and it is to be regarded not only as the precursor, but as the parent, of all the cases of the same strain that have since appeared. The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations aud circumstances, was directly presented for decision in the primary case thus referred to; for the facts were these, viz.: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was that, as the child was permitted by its custodian to wander into a position of such danger, it was without remedy for the hurts thus received, unless they were voluntarily inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that consequently, by force of the well-known rule under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian; and such infliction is justified in the case cited in this wise: "The infant," says the court, "is not sui juris. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it; the premise being that the child must be in the care and charge of an adult, and the inference being that for that reason the neglects of the adult are the neglects of the infant. But surely this is conspicuously a non sequitur. How does the custody of the infant justify or lead to the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult; but how can this right to care for and protect be construed into a right to waive or forfeit any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary or even convenient incident of this office of the adult, but on the contrary is quite inconsistent with it; for the power to protect is the opposite of the power to harm, either by act or omission. In this case, in 21 Wend. 615, it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant. But this is a mere assumptiou, without legal basis; for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother, traveling with her child in her arms, should agree with a railway company that, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds: First, the contract would be contra bonos mores; and, second, because the mother was not the agent of the child, authorized to enter into the agreement. Nevertheless the position has been deemed defensible, that the same evil consequences to the infant will follow from the negligence of the mother, in

the absence of such supposed contract, as would have resulted if such contract should have been made, and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law; for, until the case under criticism, it was absolutely unknown, nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority, this doctrine is thus expressed: "The common principle is that an infant, in all things which sound in his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage." 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of respondeat superior should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who of course can neither control nor remove him; and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former, would seem to be quite evident. Such subjectivity would be hostile in every respect to the natural rights of the infant, and consequently cannot with any show of reason be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian: "You and I, by our common carelessness, have done this wrong, and therefore neither can look to the other for redress." But when such wrong-doer says to the infant: "Your guardian and I, by our joint misconduct, have brought this loss upon you; consequently, you have no right of action against me, but you must look for indemnification to your guardian alone,"—a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrong-doer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent; the consequence being that he can in no case be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrong-doers to be answerable to a person who is incapable either of self-protection, or of being a participator in their misfeasance. Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decisions, it would, from logical necessity, follow that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinions touching the subject just discussed are in a state of direct antagonism, and it would therefore serve no useful purpose to refer to any of them. It is sufficient to say that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become in any wise a tort-feasor by imputation. 1 Shear. & R. Neg. § 75; Whart. Neg. § 311; 2 Wood, Ry. Law, 1284. In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the circuit court be advised to render judgment on the finding of the jury.

Infant. Invitation by servants to board moving car. Scope of servant's employment. Averring matter of law. Proximate cause.

SNYDER v. HANNIBAL & ST. JOSEPH R. R. CO.

(60 Mo. 413, 9 Am. Railway Rep. 254.)

Supreme Court of Missouri. May Term, 1875.

Appeal from circuit court, Buchanan county.

Hill & Carter, for appellant. M. Oliver, for respondent.

HOUGH, J. This was an action by the plaintiff to recover damages for the loss of the services of her infant son by reason of injuries alleged to have been inflicted upon him, in consequence of the negligence and carelessness of defendant's servants, and also for expenses incurred by her for medical attendance, and in nursing him during his resulting sickness.

The material portion of the petition is as follows: "The defendant was the owner of a certain railroad, running through the city of St. Joseph and across the streets and alleys thereof, and to the Missouri river bank, and the engines and cars therein, and was, and for a long time previous to the time of the injuries hereinafter complained of, had been, engaged in the business of running said engines and cars, over and upon said railroad, alternately, from defendant's depot in said city of St. Joseph to said river and back again, making numerous trips each day with its said engines and cars, over its said road between said points, through a densely inhabited part of said city, in the line of its duty and business, and defendant, by its employés, was, and for a long time previous had been, accustomed to and did, while so acting within the line of their duty and business for the defendant, willfully and unlawfully assume control over, and did carelessly and negligently induce, encourage and permit the son of plaintiff, one Henry Snyder, an infant about 11 years of age, and divers other children and boys, residing with their parents, in the vicinity of, and adjacent to defendant's said road, and in the absence of, and against the wish, entreaties and protestations of their said parents, and while their said cars were in motion, running as aforesaid, over said road, to frequently jump upon and ride upon defendant's said cars, between said points, and that said son of plaintiff, Henry Snyder, being so encouraged and permitted by said defendant's said employés, was, in obedience to his childish instincts in the premises, attempting to so jump upon said cars, to-wit, on or about the 25th day of October, 1871, and while said cars were being so run by said employés in defendant's said business, through said city between said points, when said Henry Snyder was then and there thrown down, and under the wheels of said cars, and in consequence of defendant's said carelessness and negligence, his leg was then and there run over by said cars, and was thereby so crushed and mangled, that same had to be amputated; whereby, etc.," and plaintiff claimed damages for the loss of services which would thereby be incurred by her during the whole period of her son's minority.

To this petition, the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The circuit court sustained the demurrer and rendered final judgment thereon, for the defendant, and plaintiff has appealed to this court.

The rule is firmly established that the master is civilly liable for the tortious acts of his servant, whether of omission or commission, and whether negligent, fraudulent or deceitful when done in the course of his employment, even though the master did not authorize, or know of such acts, or may have disapproved or forbidden them. Garretzen v. Duenckel, 50 Mo. 107.

The chief difficulty which has arisen in the application of this rule as appears from the adjudicated cases, has been in ascertaining whether the act complained of was committed in the course of the servant's employment.

Conceding for the present, that the petition in this case charges that the injury complained of was received by the plaintiff's son while attempting to get on the cars, in consequence of an invitation extended to him at the time by the servants of the defendant, in charge of said cars, can the defendant on such a state of facts, be held liable in this action? Can such injury be said to have happened, by reason of any act of defendant's servants, within the scope of their employment?

What was their employment? It is charged to have been the running of the engines and cars of the defendant between two points within the limits of the city of St. Joseph. It does not appear whether such cars were at the time being used in the transportation of passengers, or of freight only; or whether the defendant's servants were merely engaged in switching cars to be thereafter used for passengers or freight.

In the case of Wilton v. Middlesex R. R. Co., 107 Mass. 108, it appeared that the plaintiff, a girl of nine years of age was walking with several other girls upon the Charlestown bridge about 7 o'clock in the evening, when one of the defendant's horse cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got on the front platform, and the driver immediately struck his horses, when, by reason of their suddenly starting, plaintiff lost her balance and fell so that one of the wheels passed over her arm. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority was implied from the fact of his employment as driver. The court says: "The driver of a horse car is an

agent of the corporation having charge in part of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties but is an act within the general scope of his agency for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions."

Wharton in his work on Negligence says, that the principle announced in the foregoing case, cannot be extended so as to imply authority on the part of the engineer of a locomotive to invite a child on the machinery, and cites in support of his text, the case of Flower v. Railroad Co., 69 Pa. St. 210. In that case the fireman on an engine, which with the tender and one freight car, had been detached from a train of cars, and was stopped at a water station for water, requested a small boy standing near to put in the hose and turn on the water, and while he was climbing on the tender to put in the hose, the freight cars belonging to the train from which the engine was detached, came down, without a brakeman and struck the car behind the tender, driving the engine and tender forward 10 feet. The boy fell from the tender and was crushed to death. There was testimony that engineers were not permitted to receive any one on the engine but the conductor and superintendent. The court held that the boy was not a passenger, or one to whom the company owed a special duty, and says, "It is evident therefore, that the case turns wholly on the effect of the request of the fireman, who was temporary engineer, to put in the hose and turn on the water. Did that request involve the company in the consequences? This is a very hard case. A willing bright boy, not arrived at years of discretion, has lost his life in simply trying to oblige the fireman. But we must not suffer our sympathies to do injustice to others, by overriding those fixed principles which underlie the rights of all men and are essential to justice. It is natural justice that one man should not be held liable for the act of another, without his participation, his privity, or his authority. It is clear that the fireman, through his indolence or haste, was the cause of the boy's loss of life. Unless his act can be legally attributable to the company, it is equally clear the company was not the cause of the injury. The maxim, 'Qui facit per alium facit per se,' can only apply where there is an authority, either general or special. It is not pretended there was a special authority. Was there a general authority which would comprehend the fireman's request to the boy to fill the engine tank with water? This seems to be equally plain without resorting to the evidence given that engineers are not permitted to receive anyone on the engine but the conductor and foreman or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity. * * * It is not like the case of one injured while on board a train, by the sufferance of the conductor, whose general authority extends to receiving and discharging persons to and from the train."

In the case of Lynch v. Nurdin, 1 Adol. & E. (N. S.) 29, chiefly relied on by the appellant, the servant of the defendant was palpably negligent, in leaving the horse and cart, in his charge unattended in the street, whereby an infant who "merely indulged the natural instinct of a child, in amusing himself with the empty cart and the deserted horse," and to whom no concurrent negligence could be imputed, was injured. There the servant was clearly guilty of a negligent act in the course of his employment.

The case of Eaton v. Railroad Co., 13 Am. Law Reg. 665, decided by the New York commission of appeals, is an elaborate authority to the point that conductors of freight trains cannot create any liability on the part of the company to persons taken by them on such trains, unless the principal in some way assents to it. In that case however, the evidence not only failed to show that the company assented to the act of the freight conductor, but it was distinctly proved that it forbade the act. See, also, Judge Redfield's note to that case.

It is patent from the foregoing cases that the acts of the defendant's servant as alleged in the petition in inducing, encouraging and permitting the plaintiff's son and others to ride upon the cars operated by them, cannot be viewed as having been done by them in the course of their employment. It does not appear that they were engaged in carrying passengers or had any authority to permit persons to ride on said cars, with or without compensation, or that the invitation or permission alleged, were in furtherance of the master's interests or directly or indirectly connected with the service which they had engaged to render to it. The mere fact that a tortious act is committed by a servant while he is actually engaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must pertain to the particular duties of that employment. The general statement that the acts of defendant's servants were within the range of their employment is a mere conclusion of law which cannot help the averment of facts and can avail nothing. Gillet v. Railroad Co., 55 Mo. 315. The facts being conceded, whether a given act is within the scope of a servant's employment is a question of law for the court.

A careful examination of the petition in this case, however, discloses the fact that no invitation to get upon the cars of defendant, is alleged to have been given at the time of the injury. The petition shows that the plaintiff's son attempted to get on the train of his own motion, and in pursuance of his childish instincts and in consequence of the former permission and encouragement extended to him by defendant's servants, and was thereby injured. It contains no allegation of negligence on the part of defendant's servants at the time the child attempted to get upon the train. Such an allegation would have brought the case within the rule laid down in Lynch v. Nurdin, if the negligent acts alleged pertained to the particular duties of the servant's employment.

From all that appears the defendant's servants were, at the time of the injury, in the exercise of usual and ordinary care, and were not cognizant of the child's attempt to get upon the cars. The previous encouragement alleged to have been given by defendant's servants to plaintiff's child and other children, to get upon their cars while the same were in motion, even if it could be held to have been within the range of their employment, would not be the proximate cause of the injury complained of here.

Nothing need be said as to the character or extent of the recovery sought here. The petition fails to state a cause of action against the defendant, and the judgment of the circuit court will be affirmed. The other judges concur.

Grade-crossing accident. Signals. Conflict of testimony. Positive evidence outweighs negative. Excessive damages. Remittitur. Nonsuit. Verdict against evidence.

BOHAN v. MILWAUKEE, LAKE SHORE & W. RY. CO.

(61 Wis. 391, 21 N. W. 241, 19 Am. & Eng. R. R. Cases, 276.)

Supreme Court of Wisconsin. Nov. 6, 1884.

Appeal from circuit court, Ozaukee county.

Alfred L. Cary, for appellant. G. W. Foster, for respondent.

LYON, J. This case was here on a former appeal, and is reported in 58 Wis. 30, 15 N. W. 801. The nature of the action and the facts of the case are there sufficiently stated, and will not be repeated here. The case has been again tried, and the trial resulted in a judgment for the plaintiff, from which the defendant has appealed. The testimony on the part of the plaintiff on the last trial is substantially the same as that introduced by him on the first. By reference to the report of the case in 58 Wis. 30, 15 N. W. 801, it will be seen that the defendant introduced no testimony on the first trial. The grounds upon which the judgment went on the first appeal will appear by the following extract from the opinion: "It is not unlawful for railway companies to propel cars by pushing them in advance of the locomotive by which they are propelled, when the exigencies of their business require it to be done. If they do so under circumstances which increase the risks of injury to persons or property, the law places them under obligation to give timely and suitable notice or warning, in some manner, of what they are doing. In this case, it does not appear that the gravel cars could be distinguished or their presence discovered by persons at the street-crossing, when the plaintiff attempted to cross the track, unless by aid of the headlight. If, therefore, the head-light did not disclose to persons at that point, using proper care and watchfulness, that the locomotive was preceded by the gravel cars, the defendant company was negligent in not furnishing some other and more effectual signal or notice of the fact. Hence the case seems to turn upon the question of the sufficiency of the head-light to enable the plaintiff to discover the gravel cars by exercising due care and scrutiny. If it was sufficient, the plaintiff was negligent, and the defendant was not. If it was not sufficient, the result is reversed—the defendant was negligent, and the plaintiff was not." It was held that, under the circumstances of the case, the question whether or not the head-light was sufficient to enable the plaintiff, exercising proper care, to see the gravel cars, was for the jury. There was no proof, on the first trial, that a lighted lantern was held on the forward end of the first gravel car from the depot, or that the train bell was rung immediately before the plaintiff was injured. On the last trial, four witnesses, produced on behalf of the defendant, each testified that a brakeman stood upon the forward end of that car with a lighted lantern in his hand, plainly visible, from the time they left the gravel pit (nearly one-half mile south of the depot) until the train reached the depot. These witnesses were the conductor, engineer, and fireman on the train which injured the plaintiff, and the brakeman who held the lantern. There is a switch 230 feet south of the depot, and three of these witnesses testified that the engine bell was rung constantly while the train was passing from a point several rods south of this switch to the depot. The plaintiff and several witnesses introduced by him each testified that he saw the head-light of the approaching train when a short distance south of the depot platform, but saw no person on the forward end of the first gravel car, nor any light at that place, and that he does not remember to have heard the engine bell ring before the plaintiff was injured. This is all the testimony which in any manner tends to throw doubt upon the statements of the defendant's witnesses as to the ringing of the bell, or the presence of a lighted lantern on the gravel car.

It satisfactorily appears from all the evidence that at the time the plaintiff was injured, and immediately before, the train was running at a reasonable and lawful rate of speed, and that it was equipped with a proper head-light. It was held on the former appeal, and is res adjudicata on this appeal, that it was not unlawful for the defendant to propel its gravel cars in front of the locomotive, if that was required by the exigencies of its business. That it was so required in this case is abundantly and conclusively proved. The defendant was only required to give timely and suitable notice or warning that it was so propelling the gravel cars. We do not perceive what notice or warning, besides that furnished by the head-light, the defendant could reasonably be required to give, other than to ring the engine bell and to keep a man with a lighted lantern stationed at the head of the train. The question to be here determined is, does the testimony conclusively establish that such warnings were given in the present case?

The testimony of the plaintiff's witnesses, that they did not hear the bell ring, or did not see the lighted lantern at the head of the gravel cars, is purely negative, and its negative character is intensified by the fact, which is made perfectly obvious by their testimony, that they did not look attentively, but only casually, at the approaching train, and the attention of none of them was directed to the presence or absence of such warnings. Upon this record the credibility of the defendant's witnesses, who testified positively to the ringing of the bell and the presence of the brakeman on the gravel car

with a lighted lantern, stands unimpeached. The jury were not at liberty to disregard their testimony, but it was their duty to reconcile the testimony of all the witnesses, if that could reasonably be done. There is no difficulty in doing so in this case. The testimony of the defendant's witnesses is positive that the bell was seasonably rung, and that the brakeman stood on the forward end of the leading gravel car holding a lighted lantern; and that of the plaintiff's witnesses is that, although they had the opportunity to hear and see such warnings, they failed to do so. The testimony does not tend to show a single fact or circumstance which gives a positive character to the testimony of the plaintiff and his witnesses. Such being the nature of the testimony, the fact that the warnings were given was established, if not by the undisputed evidence, certainly by an overwhelming preponderance of testimony, and the jury were not justified in finding that they were not given. Indeed, the negative testimony of plaintiff and his witnesses, while it has some bearing upon the question of the warnings, amounts to little more than, so to speak, a mere scintilla of evidence, and did not justify the jury in their disregard of all the positive and otherwise unimpeached testimony that the warnings were given. See Muster v. Railway Co., 21 N. W. 223.

This court always has been and is very careful not to interfere with findings of facts by juries unless absolutely compelled by the law to do so. But we find one fact in this record which causes us to feel less tender of this verdict. The jury assessed the plaintiff's damages at $2,500,—a sum which, in view of the nature and extent of the plaintiff's injuries, was greatly in excess of what he ought to have recovered, if entitled to recover at all. The learned circuit judge was of that opinion, and only denied a motion for a new trial on condition that the plaintiff remit one-half of the damages so assessed. The findings of a jury who could render such a verdict are not entitled to any special consideration at the hands of the court. Indeed, the damages awarded were so excessive, probably, it ought to be held that the assessment shows such bias, prejudice, or passion on the part of the jury that the judgment ought to be reversed for that reason; because when the plaintiff was injured the train of the defendant was moving at a lawful rate of speed, and was lawfully propelling the gravel cars in front of the locomotive; because the head-light of the train was in proper condition and lighted; and because sufficient and timely warning of the approach of the train was given by the ringing of the bell, and by the presence of the brakeman with a lighted lantern on the extreme front of the train, it must be held that the defendant was not guilty of any negligence which caused the injuries complained of. The jury found specially that as the train approached, none of the defendant's men stood on the forward end of the forward gravel car, and based their finding that the defendant was guilty of negligence upon the fact alone that the front gravel car was not lighted. It follows from what has already been said that the evidence does not support these findings. At the close of the testimony the defendant moved for a nonsuit. The motion was denied. It should have been granted. Not having been granted, the circuit court should have granted the motion of the defendant for a new trial.

The foregoing views are decisive of the case; hence it becomes unnecessary to consider the question of the alleged contributory negligence of the plaintiff. Judgment reversed, and cause remanded for a new trial.

Cf. Johnson v. Scribner, 6 Conn. 185; Railroad Co. v. McDonald (1894) 152 U. S. 262, 14 Sup. Ct. 619; Southern Pac. Co. v. Pool (1896) 160 U. S. 438, 16 Sup. Ct. 338.

Office of bill of exceptions. Exceptions to charge to the jury. Generality in assignment of error. Ordinary care. Negligence, when a question of law. Running train at undue rate of speed. City ordinance. Duty to provide flagman or gates, when a question for the jury. Contributory negligence. Duty to look and listen. Request to charge on detached portions of evidence.

GRAND TRUNK RY. CO. OF CANADA v. IVES.

(144 U. S. 408, 12 Sup. Ct. 679.)

Supreme Court of the United States. April 4, 1892.

In error to the circuit court of the United States for the eastern district of Michigan. Affirmed.

E. W. Meddaugh and *Otto Kirchner*, for plaintiff in error. *Don M. Dickinson* and *E. G. Stevenson*, for defendant in error.

Mr. Justice LAMAR delivered the opinion of the court.

This was an action by Albert Ives, Jr., as administrator of the estate of Elijah Smith, deceased, against the Grand Trunk Railway Company of Canada, a Canadian corporation operating a line of railroad in Michigan, to recover damages for the alleged wrongful and negligent killing of plaintiff's intestate, without fault on his own part, by the railway company, at a street crossing in the city of Detroit. It was commenced in a state court, and was afterwards removed into the federal court on the ground of diverse citizenship. The action was brought under sections 3391 and 3392 of Howell's Annotated Statutes of Michigan, and, as stated in the declaration, was for the benefit of three daughters and one son of the deceased, whose names were given.

There was a trial before the court and a jury, resulting in a verdict and judgment in favor of the plaintiff for $5,000, with interest from the date of the verdict to the time the judgment was entered. The plaintiff offered to remit the interest, but the court refused to allow it to be done. The defendant then sued out this writ of error.

On the trial the plaintiff, to sustain the issues on his part, offered evidence tending to prove the following facts: Elijah Smith, plaintiff's intestate, at the time of his death, in May, 1884, was about 75 years of age, and had been residing on a farm, a few miles out of the city of Detroit, for several years, being engaged in grape culture. It was his custom to make one or more trips to the city every day during that period. In going to the city he traveled eastwardly on a much traveled road, known as the "Holden Road," which, continued into the city, becomes an important and well-known street running east and west. Within the limits of the city the street was crossed obliquely, at a grade, by the defendant's road and two other parallel roads coming up from the south-west, which roads, in the language of the defendant's engineer, curve "away from a person coming down the Holden road." At the crossing the Holden road is 65½ feet wide. The defendant's right of way is 40 feet wide, and the right of way of all the parallel railways at that place is 160 feet wide.

For a considerable distance—at least 300 feet—along the right side of the road going into the city there were obstructions to a view of the railroad, consisting of a house known as the "McLaughlin House," a barn and its attendant outbuildings, an orchard in full bloom, and, about 76 feet from the defendant's track, another house, known as the "Lawrence House." Then there were some shrub bushes, or, as described by one witness, some stunted locust trees and a willow, a short distance from the line of the right of way. So that it seems, from all the evidence introduced on this point, that it was not until a traveler was within 15 or 20 feet of the track, and then going up the grade, that he could get an unobstructed view of the track to the right. One witness testified that, if he was in a buggy, his horse would be within 8 feet of the track before he could get a good view of it in both directions.

On the morning of the fatal accident, Mr. Smith and his wife were driving down the Holden road into Detroit, in a buggy with the top raised, and with the side curtains either raised or removed. Opposite the Lawrence house they stopped several minutes, presumably to listen for any trains that might be passing, and while there a train on one of the other roads passed by, going out of the city. Soon after it had crossed the road, and while the noise caused by it was still quite distinct, they drove on towards their destination. Just as they had reached the defendant's track, and while apparently watching the train that had passed, they were struck by one of the defendant's trains coming from the right at the rate of at least 20—some of the witnesses say 40—miles an hour, and were thrown into the air, carried some distance, and instantly killed. This train was a transfer train between two junctions, and was not running on any schedule time. The plaintiff's witnesses agree, substantially, in saying that the whistle was not blown for this crossing, nor was the bell rung, and that no signal whatever of the approach of the train was given until it was about to strike the buggy in which Mr. Smith and his wife were riding. The train ran on some 400 feet or more after striking Mr. Smith before it could be stopped.

It further appeared that an ordinance of the city of Detroit required railroad trains within its limits to run at a rate not exceeding six miles an hour; and it likewise appeared that there was no flagman or any one stationed at this crossing to warn travelers of approaching trains.

Most of the witnesses for the defense, consisting, for the main part, of its employes aboard the train at the time of the accident, testified, substantially, that the ordinary signals of blowing the whistle and ringing the bell were given before reaching the crossing, and that, in their opinion, the train was not moving faster than six miles an hour. It must be stated, however, that some of the defendant's witnesses, the brakeman, among others, would not say that the ordinary signals were given, nor would they testify that the train was not moving faster than at

the rate prescribed by the city ordinance; and one of its witnesses, in particular, testified that the train was moving "about 20 miles an hour,—perhaps a little faster."

A witness called by the plaintiff in rebuttal, an engineer of 45 years' standing, who was examined as an expert, testified that if the train ran on, after striking Mr. Smith, the distance it was said to have gone before it could be stopped, it must have been going at the rate of 25 or 30 miles an hour; and that if it had been going but 6 miles an hour, as claimed by the defendant, it could have been stopped in the length of the engine, and even without brakes would not have run more than 35 feet, if reversed.

The foregoing embraces the substance of all the evidence set forth in the bill of exceptions on the question of how the fatal accident occurred, and with respect to the alleged negligence of the defendant in the premises, and also the alleged contributory negligence of Mr. Smith.

At the close of the testimony the defendant submitted in writing a number of requests for instructions to the jury, which, if they had been given, would have virtually taken the case from the jury, and would have authorized them to bring in a verdict in its favor. The court refused to give any of them in the language requested, but gave some of them in a modified form, and embraced others in the general charge. The refusal to give the instructions requested was excepted to, and exceptions were also noted to various portions of the charge as given. As those exceptions are substantially embodied in the assignment of errors, they will not be further referred to here, but such of them as we deem material will be considered in a subsequent part of this opinion.

The first point raised by the defendant, and urgently insisted upon as being embraced in the assignment of errors, is that there is no evidence in this record that Mr. Smith left any one dependent upon him for support, and that, therefore, no right of action could be in the plaintiff, as his administrator, under the Michigan statutes, against the defendant, for causing his death.

Sections 3391 and 3392 of Howell's Annotated Statutes of Michigan, under which this action was brought, provide as follows:

"Sec. 3391. Whenever the death of a person shall be caused by wrongful act, neglect, or default of any railroad company, or its agents, and the act, neglect, or default is such as would (if death had not ensued) entitle the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the railroad corporation which would have been liable if death had not ensued shall be liable to an action on the case for damages, notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 3392. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons, and in the proportion, provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered: provided, nothing herein contained shall affect any suit or proceedings heretofore commenced and now pending in any of the courts of this state."

According to the decisions of the supreme court of Michigan bearing upon the construction of these sections, a right of action will not arise for the negligent killing of a person by a railroad company, unless the deceased left some one dependent upon him for support, or some one who had a reasonable expectation of receiving some benefit from him during his life-time. Railway Co. v. Bayfield, 37 Mich. 205; Van Brunt v. Railroad Co., 78 Mich. 530, 44 N. W. Rep. 321; Cooper v. Railway Co., 66 Mich. 261, 33 N. W. Rep. 306.

But it seems to us that no question concerning this phase of the case can arise here upon this record. The declaration averred that the action was brought for the benefit of three daughters and one son of the deceased, whose names were given; and the defendant's plea was merely in the nature of a plea of the general issue, stating simply that the defendant "demands a trial of the matters set forth in the plaintiff's declaration." It is true that, so far as appears from this record, the only evidence with respect to the beneficiaries of the suit named in the declaration was brought out apparently incidentally, one of plaintiff's witnesses, Mrs. Briscoe, stating that she was the daughter of the deceased, and another witness stating that sometimes Mr. Smith's son went to town to attend to the sale of his farm products.

We should bear in mind, however, that it is not for this court to say that the entire evidence in the case is set forth in the bill of exceptions, for that would be to presume a direct violation of a settled rule of practice as regards bills of exceptions, viz., that a bill of exceptions should contain only so much of the evidence as may be necessary to explain the bearing of the rulings of the court upon matters of law in reference to the questions in dispute between the parties to the case, and which may relate to exceptions noted at the trial. A bill of exceptions should not include, nor as a rule does it include, all the evidence given on the trial upon questions about which there is no controversy, but which it is necessary to introduce as proof of the plaintiff's right to bring the action, or of other matters of like nature. If such evidence be admitted without objection, and no point be made at the trial with respect to the matter it was intended to prove, we know of no rule of law which would require that even the substance of it should be embodied in a bill of exceptions subsequently taken. On the contrary, to incumber the record with matter not material to any issue involved has been repeatedly condemned by this court as useless and improper. Pennock v. Dialogue, 2 Pet. 1, 15; Johnston v. Jones, 1 Black,

209, 219, 220; Zeller's Lessee v. Eckert, 4 How. 289, 297.

But, as the record fails to show that any exception was taken at the trial based upon the lack of any evidence in this particular, we repeat, it is not properly presented to this court for consideration. If the defendant deemed that the court below erroneously made no reference in its charge to the jury to the lack of any evidence in the record respecting the existence of any beneficiaries of the suit, it should have called that matter to the attention of the court at that time, and insisted upon a ruling as to that point. Failing to do that, and failing, also, to save any exception on that point, it must be held to have waived any right it may have had in that particular. The only exception taken on the trial and embodied in the assignment of errors that can, by any latitude of construction, be held to refer to this point, is the eighth request for instructions, which was refused, and which refusal is made the basis of the sixth assignment of errors. That request is as follows: "The court is requested to instruct the jury that under the evidence in this case the plaintiff is not entitled to recover, and their verdict must be for defendant." But the context and the reason given by the court for its refusal to give the instruction clearly show that that request was not aimed at this point, but related solely to the question of negligence on the part of the defendant company, and the alleged contributory negligence of the party killed. That this request for instructions meant what the court understood it to mean, and had no reference whatever to the question of evidence respecting the existence of the beneficiaries named in the declaration, is further shown by the fact that the court in its general charge assumed that such evidence had been introduced, and also by the fact that the ninth request of the plaintiff in error for instructions to the jury likewise proceeded on that assumption. That request is as follows: "The damages in cases of this kind are entirely pecuniary in their nature, and the jury must not award damages beyond the amount the evidence shows the children would probably have realized from deceased had he continued to live. Nothing can be given for injured feelings or loss of society."

Furthermore, this assignment of error is too broad and general, under the twenty-first rule of this court, (3 Sup. Ct. Rep. xii.,) to bring up such a specific objection as it seeks to do. This court should not be put to the labor and trouble of examining the whole of the evidence to see whether there was enough for the verdict below to have rested upon. But any objection made to the non-existence of evidence to support the verdict and judgment below should, in the language of the rule, "set out separately and particularly each error asserted and intended to be urged." Van Stone v. Stillwell & Bierce Manuf'g Co., 142 U. S. 128, 12 Sup. Ct. Rep. 181. In our opinion, therefore, this point raised by the plaintiff in error is without merit. As to whether, as a matter of fact, there was evidence respecting the existence of any beneficiaries to this action, we do not, of course, express any opinion. In the view above taken of the matter it is not necessary to decide that point. The legal presumption is that there was, and we shall proceed to consider the other assignments of error upon that presumption.

These assignments of error, so far as we can consider them, properly relate to but two questions: (1) Whether there was negligence on the part of the railroad company in the running of the train at the time of the accident; and (2) whether, even if the company was negligent in this particular, the deceased was guilty of such contributory negligence as will defeat this action.

With respect to the first question, as here presented, the court charged the jury, substantially, that negligence on the part of either the railroad company or the deceased might be defined to be "the failure to do what reasonable and prudent persons would ordinarily have done, under the circumstances of the situation, or doing what reasonable and prudent persons, under the existing circumstances, would not have done;" that the law did not require the railroad company to adopt and have in use, at public crossings, the most highly developed and best methods of saving the life of travelers on the highway, but only such as reasonable care and prudence would dictate, under the circumstances of the particular case; and that the question of negligence, or want of ordinary care and prudence, was one for the jury to decide. In this connection the court gave to the jury the following instruction, which, it is claimed, was erroneous:

"You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject."

But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasona-

ble men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court. Railroad Co. v. Pollard, 22 Wall. 341; Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569; Thompson v. Railway Co., 57 Mich. 300, 23 N. W. Rep. 820; Railway Co. v. Miller, 25 Mich. 274; Railway Co. v. Van Steinburg, 17 Mich. 99, 122; Gaynor v. Old Colony & Newport Ry., 100 Mass. 208, 212; Marietta, etc., Railroad Co. v. Picksley, 24 Ohio St. 654; Railroad Co. v. Ogier, 35 Pa. St. 60; Robinson v. Cone, 22 Vt. 213; Jamison v. Railroad Co., 55 Cal. 593; Redf. R. R. (5th Ed.) § 133, par. 2; 16 Amer. & Eng. Enc. Law, tit. "Negligence," 402, and authorities cited in note 2. We do not think, therefore, that this instruction was erroneous in any particular.

It is further urged that the court erred in giving to the jury the following instruction:

"If you find from the evidence in this case that the railroad train which killed Elijah Smith was moving at a rate of speed forbidden by the city ordinances, * * * the law authorizes you to infer negligence on the part of the railroad company as one of the facts established by the proof."

It is said that no evidence was introduced with respect to an ordinance of the city regulating the speed of railway trains. Counsel, in this matter, labor under a misapprehension. The bill of exceptions states that "the ordinance of the city of Detroit prohibiting the running of railroad trains within the limits of the city at a greater rate of speed than six miles per hour" was admitted in evidence, over the defendant's objections; and as there was a great deal of evidence introduced on behalf of the plaintiff that the train which killed Mr. Smith was running at a much more rapid rate than the ordinance permitted, the instruction quoted was applicable, and, under the authorities, was as favorable to the defendant as it had the right to demand. Indeed, it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence *per se*. Schlereth v. Railway Co., 96 Mo. 509, 10 S. W. Rep. 66; Railway Co. v. White, 84 Va. 498, 5 S. E. Rep. 573. But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence. Railway Co. v. Rassmussen, 25 Neb. 810, 41 N. W. Rep. 778; Blanchard v. Railway Co., 126 Ill. 416, 18 N. E. Rep. 799; Meloy v. Railway Co., 77 Iowa, 743, 42 N. W. Rep. 563; Railway Co. v. Flannagan, 82 Ga. 579, 9 S. E. Rep. 471; Peyton v. Railway Co., 41 La. Ann. 861, 6 South. Rep. 690. At any rate, the charge of the court in this particular was not unfavorable to the defendant, under the law. Haas v. Railroad Co., 41 Wis. 44; Railroad Co. v. McGowan, 62 Miss. 682; Railroad Co. v. Stebbing, 62 Md. 504; McGrath v. Railroad Co., 63 N. Y. 522; Railroad Co. v. Terry, 42 Tex. 451; Bowman v. Railroad Co., 85 Mo. 533; Crowley v. Railroad Co., 65 Iowa, 658, 20 N. W. Rep. 467, and 22 N. W. Rep. 918; Keim v. Transit Co., 90 Mo. 314, 2 S. W. Rep. 427; Ellis v. Railroad Co., 138 Pa. St. 506, 21 Atl. Rep. 140; 4 Amer. & Eng. Enc. Law, tit. "Crossings," 934, and authorities cited in notes 8 and 10.

One of the chief assignments of error, and perhaps the one most strongly relied on to obtain a reversal of the judgment below, is that the court erred in giving the following instruction:

"So if you find that because of the special circumstances existing in this case, such as that this was a crossing in the city much used and necessarily frequently presenting a point of danger, where several tracks run side by side, and there is consequent noise and confusion and increased danger; that owing to the near situation of houses, barns, fences, trees, bushes, or other natural obstructions which afforded less than ordinary opportunity for observation of an approaching train, and other like circumstances of a special nature, it was reasonable that the railroad company should provide special safeguards to persons using the crossing in a prudent and cautious manner,—the law authorizes you to infer negligence on its part for any failure to adopt such safeguards as would have given warning, although you have a statute in Michigan which undertakes by its provisions to secure such safeguards in the way the statute points out. The duty may exist outside the statute to provide flagmen or gates or other adequate warnings or appliances, if the situation of the crossing reasonably requires that,—and of this you are to judge,—and it depends upon the general rule that the company must use its privilege of crossing the streets on its surface grade with due and reasonable care for the rights of other persons using the highway with proper care and caution on their part.

"So if you find that the train hands kept no proper lookout, and managed the train without due caution and reasonable care, you will be authorized to infer negligence on the part of the company as one of the facts established in the case."

That this instruction is in harmony with the general rule of law obtaining in most of the states and at common law we think there can be no doubt. The general rule is well stated in Railway Co. v. Kuhn, 86 Ky. 578, 589, 6 S. W. Rep. 441, as follows: "The doctrine with reference to injuries to those crossing the track of a railway where the right to cross exists is that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country; so what is reasonable care and prudence must depend on the facts of each case. In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or

bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons passed each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient." Citing Thomp. Neg. 417; Railroad Co. v. Goetz, 79 Ky. 442. And it was accordingly held in that case that a railroad company which had failed to provide a flagman or gates during the night-time, when many trains were passing, at a crossing in a thickly populated portion of the city of Louisville, buildings being situated near the track at that point, was guilty of "negligence of the most flagrant character." See, also, to the same effect, Railroad Co. v. Dunn, 78 Ill. 197; Bentley v. Railway Co., 86 Ala. 484, 6 South. Rep. 37; Railroad Co. v. Young, 81 Ga. 397, 7 S. E. Rep. 912; Troy v. Railroad Co., 99 N. C. 298, 6 S. E. Rep. 77; Bolinger v. Railroad Co., 36 Minn. 418, 31 N. W. Rep. 856.

It is also held in many of the states (in fact the rule is well-nigh, if not quite, universal) that a railroad company, under certain circumstances, will not be held free from negligence, even though it may have complied literally with the terms of a statute prescribing certain signals to be given, and other precautions to be taken by it, for the safety of the traveling public at crossings. Thus in Railroad Co. v. Perkins, 125 Ill. 127, 17 N. E. Rep. 1, it was held that the fact that a statute provides certain precautions will not relieve a railway company from adopting such other measures as public safety and common prudence dictate. And in Thompson v. Railroad Co., 110 N. Y. 636, 17 N. E. Rep. 690, it was held that the giving of signals required by law upon a railway train approaching a street crossing does not, under all circumstances, render the railway company free from negligence, especially where the evidence tends to show that the train was being run at an undue and highly dangerous rate of speed through a city or village. See, also, Louisville, etc., Ry. Co. v. Com., 13 Bush. 388; Weber v. Railroad Co., 58 N. Y. 451. The reason for such rulings is found in the principle of the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way. As a general rule it may be said that whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous is a question of fact for a jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence, although in some cases it has been held that it is a question of law for the court. It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is in a thickly populated portion of a town or city; or that the view of the track is obstructed either by the company itself, or by other objects proper in themselves; or that the crossing is a much traveled one, and the noise of approaching trains is rendered indistinct, and the ordinary signals difficult to be heard, by reason of bustle and confusion incident to railway or other business; or by reason of some such like cause; and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country. The following cases are illustrative of various phases of the rules we have just stated: Eaton v. Railroad Co., 129 Mass. 364; Bailey v. Railroad Co., 107 Mass. 496; Pennsylvania R. Co. v. Matthews, 36 N. J. Law, 531; Railroad Co. v. Killips, 88 Pa. St. 405; Railroad Co. v. Richardson, 25 Kan. 391; State v. Philadelphia, etc., R. Co., 47 Md. 76; Welsch v. Railroad Co., 72 Mo. 451; Frick v. Railway Co., 75 Mo. 595; Railway Co. v. Yundt, 78 Ind. 373; Hart v. Railway Co., 56 Iowa, 166, 7 N. W. Rep 9, and 9 N. W. Rep. 116; Kinney v. Crocker, 18 Wis. 74.

But it is insisted that these rules are none of them applicable to this case, because the whole subject of signals and flagmen, gates, etc., at crossings in Michigan is regulated by statute. The claim is put forth that under the statute of Michigan (3 How. St. § 3301) an officer of the state, known as the "railroad commissioner," is charged with the duty of determining the necessity of a flagman at any and all crossings in the state, and that, unless an order had been made by him requiring a railroad company to station a flagman at any particular crossing, the failure on the part of the company to provide such flagman could not even be considered as evidence of negligence; and that in this case no such order by the commissioner is shown to have been made. Battishill v. Humphreys, 64 Mich. 494, 31 N. W. Rep. 894; Guggenheim v. Railway Co., 66 Mich. 150, 33 N. W. Rep. 161; and Freeman v. Railway Co., 74 Mich. 86, 41 N. W. Rep. 872,—are relied on as sustaining this contention.

If the construction of this statute by the Michigan courts be as claimed by the defendant, of course this court would feel constrained to adopt the same construction, even if we thought it in conflict with fundamental principles of the law of negligence to which we have referred in a preceding part of this opinion, obtaining in other states. Meister v. Moore, 96 U. S. 76; Bowditch v. Boston, 101 U. S. 16; Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. Rep. 263; Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. Rep. 974; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. Rep. 1012.

But do the Michigan cases cited sustain the defendant's contention? We think not; but rather that they support the rule laid down by the court below in the charge excepted to. In Battishill v. Humphreys, the court below had refused to instruct the jury, upon a request by the plaintiff in error, that "the railroad law of this state (article 4, § 3) lays upon the railroad commissioner of the state the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railway and, upon

the testimony and under the pleadings in this case, the absence of a flagman at Summit avenue is no evidence of any negligence upon the part of the receivers."

Such refusal having been assigned as error, the supreme court of the state held that the instruction should have been given, and accordingly reversed the judgment below. In the opinion the court said:

"I think the second request of the defendants should have been given. No reference was made to this matter in the charge of the court, and it may well be considered, when a request is specifically made, and it is refused, that the jury will take such refusal as a liberty to infer that the request is wrong in law, unless some explanation is made by the court of the reasons for such refusal to rebut such natural inference * * * Evidence of this nature was introduced, and the request which ought to have been given denied, and we cannot say it did not have some influence upon the jury in determining the question of the negligence of the company."

If this decision stood alone, there would be much force in the contention of the defendant in this case; but the other decisions referred to have explained it, and apparently qualified the broad doctrine laid down in it, bringing the rule in Michigan in harmony with the generally accepted rule obtaining elsewhere.

Thus in Guggenheim v. Railway Co., although it was stated in the opinion that "the railroad company is not compelled to keep a watchman or flagman at every street or road crossing when a jury, upon a trial like this, might think it necessary to have one stationed;" and that "this matter is regulated under the statutes of our state by the railroad commissioner;" yet it was held that when the company itself so obstructs its track that its trains cannot be seen by travelers approaching a crossing, or so that the ordinary signals required by statute will not be sufficient to warn travelers of the approach of trains, "some additional warning must be given, and there are cases where a flagman would be necessary to acquit the company of negligence." And it was further held that the trial court was right in instructing the jury that it was the duty of the company to give to the traveler on the highway due and timely warning of the coming of its trains and the approaching danger "either by bell or whistle, or both, or by some other means, and in such a way as to give him an opportunity, by the exercise of due diligence and care, to meet and guard himself from danger;" thus showing that a duty on the part of the railway company to provide against accidents at crossings may and does exist outside of the statute.

But the case of Freeman v. Railway Co., which, so far as we have examined, is the latest adjudication of the supreme court of Michigan on the subject, contains the most thorough discussion of the general question of any of those referred to by the defendant, and, so far from sustaining its contention, is directly opposed to it, and in line with the instruction given by the court below in this case. In that case one of the questions considered by the court was whether it was negligence on the part of the railway in not providing a flagman at the crossing of Genesee street, in the city of Marquette, the railroad commissioner not having required it to station one there. The facts in relation to the hazardous nature of the crossing are referred to particularly in the opinion of the court from which we quote. In considering the question the court went very fully into the merits of it, in all its bearings, and said: "The contention of the defendant is that it was not negligence. It is claimed that under the statutes of this state the duty of determining where flagmen shall be stationed devolves upon the railroad commissioner; and that, in order to hold defendant liable for such negligence in this case, it should have appeared in proof that the railroad commissioner had ordered a flagman to be stationed at this crossing, and that his orders were not obeyed, or that the crossing was such an exceptionally dangerous one that a common-law duty was imposed on the defendant to keep a flagman at that point; and that no showing of this kind was made."

Replying to this contention the court said: "We think the judge below ruled correctly on this point, and in accordance with our previous decisions. The jury were instructed, substantially, that it is not the law of this state that at every road or street crossing in a village or city a railroad company is bound to place a flagman. The law puts upon the railroad commissioner the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railroad, and the absence of a flagman at Genesee-Street crossing, where the accident occurred, is of itself no evidence of negligence upon the part of the defendant. And the plaintiff must show that the circumstances of the crossing are such that common prudence would dictate that the railroad company should place a flagman there, or his equivalent. That, before the jury could find this, it must be made to appear to them that the danger at the crossing was altogether exceptional,—that there was something about the case rendering ordinary care on the part of the witness Grant (the driver of the carriage which was run over and broken up at the crossing) an insufficient protection against injury, and therefore made the assumption of the burden of a flagman on the part of the railroad company a matter of common duty for the safety of people crossing. 'You have, as I said before, been at this crossing; you have seen the situation; you have seen its relation to travel and to the city; and it is for you to determine, if you reach that point, under all the circumstances of the case, whether or not it was negligence, under the instructions I have given you and the evidence, not to have a flagman there.'"

The supreme court then went on to say: "If any fault can be found with this charge, it was too favorable to the defendant, in that it connected the necessity of keeping a flagman at the crossing with

the use of ordinary care on the part of Grant. The duty of retaining a flagman at this point did not depend on the question whether Grant, in this particular instance, could by common prudence have avoided this collision or not. It depended rather upon the situation of the crossing, its relation to the travel upon the street generally, and the facilities afforded, not only the travelers on the street, but the trainmen on the cars, to avoid collisions and accidents of this kind, without a flagman to give warning of approaching trains.

"I think the jury were warranted in finding it to be negligence in the defendant in not providing a watchman at this point. It seems that to the south from Genesee street there was a steep up-grade, so that a train of loaded cars must, in order to ascend the same, cross the street at a higher rate of speed than would, considering the situation of the crossing, be prudent to the safety of passers on the street, without warning of the train's approach. A train coming from the north could not be seen at all by those traveling on the street in the direction Grant was driving, until the traveler was within 40 feet of the track, and the train within from 150 to 175 feet of the center of the street: and the engineer on the train, being lower down in his cab than a man in a buggy, could not get his eye into Genesee street west of the track, as was the fact in this case, until the locomotive was within 60 or 75 feet from the crossing, and then his vision would only extend 40 or 50 feet west of the track on the street. Under such circumstances a train ought to run over this crossing so that it could be stopped at once, or a flagman ought to be stationed where he could give warning of its approach. When an engineer, at a distance beyond 75 feet from the crossing of a street in a city like Marquette, cannot see into the street except the straight line thereof where the track crosses, and the traveler cannot see even the top of the locomotive until he gets within 40 feet of the track, something more than ordinary pains to prevent accidents is incumbent both on the railroad company and also on the traveler, if such traveler is acquainted with the situation.

"In Battishill v. Humphreys we held, under the pleadings and testimony in the case, that the absence of a flagman at Summit-Avenue crossing in Detroit could not be considered negligence in the railroad company, as the railroad commissioner had not determined that it was necessary to maintain one there. But nothing was said, or intended to be said, in that opinion, that there could be no negligence, in any case, in not maintaining a flagman at a street crossing unless such commissioner had ordered one to be stationed there. In Guggenheim v. Railway Co. the law in this respect is laid down substantially as the circuit judge in this case instructed the jury."

We have quoted extensively from the opinion in the case last referred to, because it seems to us a complete refutation of the contention of the defendant herein, and states the law on this point substantially as the court below did in its charge to the jury in this case, and because, also, the facts and circumstances relative to the railroad crossing there were so very similar to those in this case that it makes it a very strong authority in support of the judgment below. The underlying principle in all cases of this kind which requires a railroad company not only to comply with all statutory requirements in the matter of signals, flagmen, and other warnings of danger at public crossings, but many times to do much more than is required by positive enactment, is that neither the legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company at a crossing, in every particular case which may afterwards arise; for, as already stated, each case must stand upon its own merits, and be decided upon its own facts and circumstances, and these are the features which make the question of negligence primarily one for the jury to determine, under proper instructions from the court. We think, therefore, that, in that portion of the charge which we have been discussing, the court below committed no error to the prejudice of the defendant.

But it is claimed that the last paragraph of that portion of the charge last above quoted, referring to the question whether or not the trainmen kept a proper lookout and managed the train in a prudent and cautious manner, was erroneous, because, so it is claimed, "there was no evidence that the train hands kept no proper lookout," etc. This contention is also without merit. There was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the train was running at a more rapid rate than was permitted by the city ordinance. If the jury believed that evidence they must necessarily have found that the trainmen did not keep a proper lookout, and did not manage the train in a prudent and careful manner. The instruction complained of was certainly not prejudicial to the defendant in this particular, since it referred to matters concerning which evidence had been admitted, and was correct on principle. The most that can be said against it is that the substance of it had perhaps been given in another portion of the charge, and the court below need not have given it; but the giving it in different language, while not necessary, and while also correct practice might require that it be not given, was not reversible error. So far, then, as the instructions of the court below upon the first question, as above arranged, are concerned, we conclude there was no error prejudicial to the defendant. And this leads to a consideration of the question of the alleged contributory negligence on the part of the deceased.

It is earnestly insisted that, although the defendant may have been guilty of negligence in the management of its train which caused the accident, yet the evidence in the case given by the plaintiff's own witnesses shows that the deceased himself was so negligent in the premises that but for such contributory negligence on his part the accident would not have hap-

pened; and it is therefore contended that the court below should, as matter of law, have so determined, and, it not having done so, this court should so declare, and reverse its judgment. To this argument several answers might be given, but the main reason why it is unsound is this: As the question of negligence on the part of the defendant was one of fact for the jury to determine under all the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased, which was the proximate cause of the injury, was likewise a question of fact for the jury to determine under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other. This rule is sustained by the Michigan authorities, (Mynning v. Railroad Co., 64 Mich. 93, 31 N. W. Rep. 147; Underhill v. Railway Co., 81 Mich. 43, 45 N. W. Rep. 508; Baker v. Railroad Co., 68 Mich. 90, 35 N. W. Rep. 836; Engel v. Smith, 82 Mich. 1, 46 N. W. Rep. 21;) and its correctness is apparent from an examination and analysis of the generally accepted definitions of contributory negligence, as laid down by the courts and by text-writers. Without going into a discussion of these definitions, or even attempting to collate them, it will be sufficient for present purposes to say that the generally accepted and most reasonable rule of law applicable to actions in which the defense is contributory negligence may be thus stated: Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years, (having been first enunciated in Davies v. Mann, 10 Mees. & W. 546,) that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. Coasting Co. v. Tolson, 139 U. S. 551, 558, 11 Sup. Ct. Rep. 653, and cases cited; Donohue v. Railroad Co., 91 Mo. 357, 2 S. W. Rep. 424, and 3 S. W. Rep. 848; Railroad Co. v. Patton, 31 Miss. 156; Deans v. Railroad Co., 107 N. C. 686, 12 S. E. Rep. 77; 2 Thomp. Neg. 1157; Cooley, Torts, (1st Ed.) 675; 4 Amer. & Eng. Enc. Law, tit. "Contributory Negligence," 30, and authorities cited in note 1.

With respect to the question of the alleged contributory negligence of the deceased, the court charged the jury as follows:

"Turning, now, to the conduct of Smith, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, you will understand that, no matter how negligently the company ran this train, or how unreasonably they neglected to provide sufficient safeguards at the crossing, if he brought his death upon himself by his own negligence his administrator is not entitled to a verdict in this suit.

"So if you find that he was familiar with this crossing and its dangers, one and all of them; that he frequently used it, and knew how to act in using it to protect himself; and that under the special circumstances which you find he failed to act as a prudent and cautious man should have acted from beginning to end, or that he omitted some precaution that a prudent man ought to have taken, whereby he lost his life,—the plaintiff cannot recover. He should use all his faculties of seeing and hearing; he should approach cautiously and carefully; should look and listen, and do everything that a reasonably prudent man would do before he attempted to make the crossing. Scrutinize his actings and doings under the light of the then situation; the nature and character of the crossing; the fact of the difficulty of observation; the time of day and the probability of danger from passing trains; the fact that there were other railroads side by side; that another train on one of these was actually approaching and passing; the noise and confusion; possibly the noise and confusion of signals; and every fact and circumstance bearing on the case to influence his conduct then and there, under those circumstances and not any other circumstances,—and say upon your fair and impartial judgment whether he acted as a reasonable and prudent man should have acted, and with the due care and caution demanded by the exigencies of the occasion.

"If he did so act, and the railroad company was negligent, his administrator is entitled to your verdict. If he did not so act, the railroad company is entitled to your verdict, whether it was negligent or not. If it was not negligent, it is entitled to your verdict, no matter how Smith acted."

These instructions are so full and complete, and are in such entire accord with the rules of law applicable to cases of this character, that no fault whatever can be found with them. They embody substantially the entire law of the case on the questions under consideration, and were applicable to every feature of it. Indeed, if they are open to any criticism at all it is that they were more favorable to the defendant than it had the right to demand, under the rules above stated, since they enabled the defendant to be relieved from any liability in the case if the deceased had been guilty of contributory negligence, even though it might, by the exercise of ordinary care and prudence, have averred the results of such negligence. Mr. Pierce, in his work on Railroads, (page 343,) after a review of the authorities on the subject, lays down substantially the same

general rule as to the care required of travelers at railway crossings, in the following terms: "A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing, in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If by neglect of this duty he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the legal rate." See, also, generally upon this question, 4 Amer. & Eng. Enc. Law, 68–78, and authorities cited in the notes.

The recent case of Sullivan v. Railroad Co., from Massachusetts, which, in advance of the official reports, is published in 28 N. E. Rep. 911,[1] is so similar to the one at bar on this question that it deserves more than a passing notice. The substance of the case is stated in the syllabus by the reporter as follows:

"Plaintiff, a woman about 65 years of age, of ordinary intelligence, and possessed of good sight and hearing, was injured at a railroad crossing. The railroad had been raised several feet higher than the sidewalk, and the work of grading was still unfinished, and the crossing in a broken condition. There were three tracks, and a train was approaching on the middle one. The view was obstructed somewhat with buildings, but after reaching the first track it was clear. The evidence showed that the plaintiff was familiar with the passing of trains; that she did not look before going upon the track; and that, if she had looked, she could have seen the train a quarter of a mile. When the whistle sounded she looked directly at the train, and hurried to get across. Plaintiff testified that she looked before going upon the track, but did not see the train or hear the whistle; that the only warning she had was the noise of its approach, after she was on the first track; and that she did not then look to see where it was, or on which track it was coming, but started to cross as fast as possible, and in so doing stumbled, and fell between the rails. The signals required by the statutes were not given. Held, that it did not appear as matter of law that plaintiff was guilty of gross or willful negligence, and that it was proper to submit the question to the jury."

See, also, Evans v. Railway Co., (Mich.) 50 N. W. Rep. 386; Ellis v. Railway Co., 138 Pa. St. 506, 21 Atl. Rep. 140; Brown v. Railway Co., 42 La. Ann. 350, 7 South. Rep. 682; Heddles v. Railway Co., 77 Wis. 228, 46 N. W. Rep. 115; Parsons v. Railroad Co., 113 N. Y. 355, 21 N. E. Rep. 145; Cooper v. Railway Co., 66 Mich. 261, 33 N. W. Rep. 306.

Nothing was said by this court in Railroad Co. v. Houston, 95 U. S. 697, or in Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. Rep. 1125, which are relied upon by the defendant, that in any wise conflicts with the instructions of the court below in this case, or lays down any different doctrine with respect to contributory negligence. Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569. Nor do the Michigan authorities which are relied upon, when read in the light of the particular facts and circumstances of each separate case, enunciate a different doctrine; but, so far as applicable, they tend to sustain the instructions objected to.

It is also insisted that the court erred in refusing the following request of the defendant for instructions:

"If you find that the deceased might have stopped at a point fifteen or eighteen feet from the railroad crossing, and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track, watching the Bay City train, that had already passed, and with his back turned in the direction of the approaching train,—the deceased was guilty of contributing to the injury, and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declaration."

The reason given by the court for refusing this request was that "it is too much upon the weight of the evidence, and confines the jury to the particular circumstance narrated, without notice of others that they may think important." This reason is a sound one. In determining whether the deceased was guilty of contributory negligence the jury were bound to consider all the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others. Cooper v. Railway Co., supra; Railroad Co. v. Kane, 69 Md. 11, 13 Atl. Rep. 387. Moreover, the substance of the request, so far as it was correct, had already been given, in general terms, by the court in that part of the charge referring to the degree of care and caution required of the deceased in approaching the railroad crossing, in order to free him from the charge of contributory negligence; and the refusal of the court to give it again, in different language, was not error. Railroad Co. v. Winter, 143 U. S. 60, 75, 12 Sup. Ct. Rep. 356.

There are no other questions in the case that call for special consideration. We have endeavored to consider and pass upon all of the material ones that have been discussed by counsel both in their brief and in oral argument at the bar. We do not think that it has been shown that any error was committed in the trial below which was prejudicial to the rights of the defendant. Judgment affirmed.

Cf. Dyson v. New York & New England R. R. Co. (1888) 57 Conn. 9, 17 Atl. 137; Chicago & Northwestern Railway Co. v. Dunleavy (1889) 129 Ill. 132, 22 N. E. 15; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661.

[1] 154 Mass. 524.

Contributory negligence. Burden of proof. Nonsuit. Duty to look and listen.

TOLMAN v. SYRACUSE, BINGHAMPTON & NEW YORK R. R. CO.

(98 N. Y. 198.)

Court of Appeals of New York. Feb. 10, 1885.

Action by Cynthia A. Tolman, administratrix, etc., against the Syracuse, Binghampton & New York Railroad Company to recover damages for negligently causing the death of plaintiff's intestate. There was a judgment for plaintiff, and defendant appealed. Reversed.

Louis Marshall, for appellant. T. K. Fuller, for respondent.

FINCH, J. A careful examination of the testimony given upon the trial leads us to the conclusion that upon the issue of defendant's negligence there was, perhaps, a question of fact for the jury. While the proof was extremely weak and its decided preponderance was against the plaintiff, it is difficult to say that there was none. It is not in the least doubtful that somewhere between the whistle post and the Jamesville crossing the bell of the engine was rung and the whistle sounded. That fact is established not merely by the evidence of the three persons on the engine who testify that they gave the signals, but by passengers on the train who heard them, one of whom was a witness for the plaintiff, and by two other persons who resided near the crossing. The fact is further and very conclusively corroborated by the circumstance that every one of the plaintiff's witnesses heard either the whistle, or the bell, or both. But the question when these signals were given; whether at the whistle post or at the crossing; whether before the accident or only at the moment of its occurrence, is left open to a possibility of doubt, and, it may be, cannot be determined as matter of law. The whistle post was distant from the crossing about a quarter of a mile, and as the train was running not less than thirty miles an hour it took but thirty seconds to run from the signal point to the crossing, and the conflicting theories depend upon what occurred within that brief interval. Several witnesses for the plaintiff testify that the sounding of the whistle and the application of the air-brake, which last confessedly occurred at the moment of the accident, were cotemporaneous, at the same instant, and without appreciable interval. While this evidence was largely matter of judgment, and extremely open to error or mistake, we cannot reject it wholly, and it is possible that it brought the issue within the province of the jury.

But upon the question of contributory negligence we disagree with the general term. The burden was upon the plaintiff of showing affirmatively, either by direct evidence or the drift of surrounding circumstances, that the deceased was himself without fault, and approached the crossing with prudence and care, and with senses alert to the possibility of approaching danger. He must look and listen, and is excusable for the omission only when the circumstances show that both precautions were impossible or unavailing. There is no evidence, direct or inferential, of the exercise of such care and prudence by the deceased. He was familiar with the locality, and had often passed the crossing. The highway which he traveled from Syracuse approached the rails at a very acute angle, and for a thousand feet from such crossing gave an unobstructed view of the railroad. At the crossing, the track could be seen to the north for a distance of twenty-seven hundred feet, no obstacle intervening to bar the line of vision. The deceased left Syracuse after having indulged to some extent in the use of intoxicating liquor. One witness rode with him to the toll-gate and there left him, describing him as silent and dull. Some evidence indicates that he was awake at that point, but one of the men on the engine swears that as deceased approached the crossing his head was bent back upon some object behind him in the sleigh. This witness, it is said, was impeached by proof of contradictory statements. But, excluding his evidence, it still remains apparent that the deceased, if awake and exercising his senses and the caution demanded by his situation, could have seen and might have avoided the train, unless the night was so dark that he could not see, and of such character and surroundings that the noise of an approaching train could not be heard. The burden of establishing affirmatively freedom from contributory negligence may be successfully borne, though there were no eye-witnesses of the accident, and even although its precise cause and manner of occurrence are unknown. If, in such case, the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by a jury and require a choice between possible, but divergent, inferences. If, on the other hand, those facts and circumstances coupled with the occurrence of the accident do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, then the inference of negligence is the only one left to be drawn, and the burden resting upon the plaintiff is not successfully borne, and a nonsuit for that reason becomes inevitable.

In the present case, except for the darkness of the night, there was no obstacle to the vision of the deceased for a long distance from the crossing. Neither houses, nor trees, nor inequalities of the land were obstacles to his sight for a distance from the crossing towards the approaching train of more than half a mile. His horse appears to have been quiet and kind, and susceptible of easy control. The approach to the crossing was quite

bare of snow, naturally compelling a moderate speed of the sleigh. Unless, therefore, the facts disclose that the darkness and the mist were such as to make it impossible to see the head-light of the engine at a distance adequate for sufficient warning, it is a necessary inference that the deceased did not look, and that his death was the result of a blind or reckless movement upon the track, which ordinary care would have surely prevented. The very darkness made more necessary the duty of watchfulness, and if the deceased could have seen the lights of the train in season for safety the accident itself demonstrates that he did not look, or that if he did, he ventured upon a hazardous effort to cross in spite of the danger. Now the evidence establishes, without the least contradiction, that to one approaching the crossing and looking to the west along the railroad, the headlight of the engine and the lights of the cars were visible for a distance great enough to give adequate warning. One of the plaintiff's own witnesses, upon the accuracy of whose observation and the truth of whose statement the plaintiff depended as showing that the train was at the crossing when the whistle sounded, clearly establishes the fact. He lived south and east of the crossing, at a distance of one thousand and forty feet therefrom. He sat in a west room of his house, the outlook being towards the crossing, and his line of vision forming an acute angle with the track at that point, his house being three hundred and sixty-nine feet in a direct line from the rails. He sat by the window, and hearing the whistle, looked out, shading his eyes from the light of his room, and saw the lights of the train, and was able to locate it as at or just south of the crossing. Another of plaintiff's witnesses came to the depot soon after the accident, and noticed a train going north, and saw it near the water-tank. He added: "The train must have been sixty to eighty rods away then, I should think; there was no difficulty in my seeing it until after it passed the bend in the road; there was nothing in the character of the atmosphere that night which prevented my seeing the train sixty rods; I saw the lights on the hind end of it." Still another of plaintiff's witnesses, walking upon the track with his back to an approaching train, neither looking nor listening, and giving no heed to the possibility of danger, was startled by seeing the glow of the head-light in front of him in time to take the alarm and escape the danger. He thinks the train was eight or ten rods off when he became conscious of the light. If he saw it at that distance shining from behind his back, it is not at all doubtful that, looking towards the headlight, it would have been visible at a very much greater distance. All the rest of plaintiff's witnesses, however they emphasize the darkness, admit their ability to have seen lights at varying distances. The lights of the houses as the train left the city, and the lanterns of the trainmen as they moved about the scene of the accident, were all visible. On the part of the defendant, one witness, passing soon after the accident, could see the lights of the houses and discern the fences and trees, and found his way without difficulty, though his horse was blind. Two others, one stationed over two hundred feet and the other about four hundred feet from the crossing, were able, through their windows and under that disadvantage, to see the lights of the cars and so observe the passage of the train. Other witnesses found no difficulty in going to their homes, and noticed that objects at the roadside and lights in the houses were visible as they passed along. On this state of facts it is impossible to doubt that deceased might have seen the approaching train if he had looked for it, as a prudent man should. The facts leave the occurrence explainable as to its cause and occasion, only by the theory of negligence on the part of deceased. They indicate no way in which the accident might have happened, suggest no adequate cause which could or might have operated, which way or cause showed freedom from fault on the part of deceased, and could have produced the result in spite of his care and prudence. The evidence leaves no rational ground for any other inference than one of neglect and want of care.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except RUGER, C. J., not sitting, and DANFORTH, J., absent.

Judgment reversed.

S. P., Chase v. Maine Central R. R. Co. (1886) 78 Me. 346, 5 Atl. 771, 19 Am. & Eng. R. Cas. 356.

Measure of employer's duty. Ordinary risks of employment. Absence of warning signals in switch yard. Contributory negligence. Directing verdict.

AERKFETZ v. HUMPHREYS et al.

(145 U. S. 418, 12 Sup. Ct. 835.)

Supreme Court of the United States. May 16, 1892.

In error to the circuit court of the United States for the Eastern district of Michigan. Affirmed.

Statement by Mr. Justice BREWER:

On May 17, 1887, William Aerkfetz, being under 21 years of age, by Frederick Aerkfetz, his next friend, commenced this action in the circuit court of the United States for the Eastern district of Michigan against the defendants in error, receivers duly appointed and in possession of the Wabash Railroad, to recover damages for personal injuries caused, as alleged, by their negligence. The defendants answered, and on a trial before a jury the verdict and judgment were for the defendants. To reverse such judgment this writ of error has been sued out.

C. E. Warner and L. T. Griffin, for plaintiff in error. Wells H. Blodgett, for defendants in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

Plaintiff was in the employ of the defendants in the yard of the railroad company at Delray, working on one of the tracks therein, and, while so engaged, was run over and injured by a freight car, moved by a switch engine.

The defenses presented were three: First, the receivers were guilty of no negligence; second, even if they were, plaintiff was guilty of contributory negligence; and, third, whatever negligence there was, if any, was that of a fellow servant. The trial court directed a verdict for the defendants on the ground of contributory negligence. Much might be said in favor of each of the three propositions advanced by the defendants. We rest our affirmance of the judgment upon the grounds that, under the circumstances, there was no negligence on the part of the defendants, and that the accident occurred through a lack of proper attention on the part of the plaintiff.

There is little dispute in the testimony, and the facts, as disclosed, are plainly these: The Delray yard is in the western part of the city of Detroit. In it were 12 tracks and side tracks, and the yard was used for the making up of trains. A switch engine was employed therein, and, as might be expected, was constantly moving forward and backward, changing cars, and making up trains. Plaintiff was a repairer of tracks. He had been employed there about 18 months, and was familiar with the manner in which the work was done. The yard was about a quarter of a mile in length. The tracks were in a direct line east and west, with nothing to obstruct the view in either direction. At the time of the accident plaintiff was working near the west end of the yard, when a switch engine pushing two cars moved slowly along the track upon which he was at work, the speed of the engine being about that of a man walking. Plaintiff stood with his back to the approaching cars, and so remained at work, without looking backward or watching for the moving engine, until he was struck and run over by the first car.

Upon these facts we observe that the plaintiff was an employé, and, therefore, the measure of duty to him was not such as to a passenger or a stranger. As an employé of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary and that which was necessary in the making up of trains. For a quarter of a mile east of him there was no obstruction, and by ordinary attention he could have observed the approaching cars. He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which cars were to be expected, and continues his work without ever turning to look. Abundance of time elasped between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employé, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employé, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forward and backward, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employés in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars, and enabled him to step one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of

giving notice to employés who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants, and, if by any means negligence could be imputed to them, surely the plaintiff by his negligent inattention contributed directly to the injury.

The judgment was right, and it is affirmed.

Fellow-servant doctrine. Conductor and track repairer. Ordinary risks incident to the business. Test of common employment. Different departments of service. Gradations of rank.

NORTHERN PACIFIC R. R. CO. v. HAMBLY.

(154 U. S. 349, 14 Sup. Ct. 983.)

Supreme Court of the United States. May 26, 1894.

No. 187.

In error to the circuit court of the United States for the district of North Dakota.

This was an action by George Hambly against the Northern Pacific Railroad Company for personal injuries. The jury found a verdict for plaintiff, and judgment was entered thereon, defendant's motion for a new trial being denied. The judges of the circuit court certified certain questions, on which they were divided in opinion, for the opinion of the supreme court.

This was an action by Hambly to recover damages for personal injuries sustained by him while acting as helper to a crew of masons engaged in building a stone culvert for the defendant company on its right of way, about two miles west of Jamestown, in North Dakota. Upon the trial of the case before a jury, the following facts were proven and admitted to be true by both parties, viz.: "That the plaintiff was a common laborer in the employ of the defendant company, and, at the time he received the injury which is the ground of this action, he was in the service of the defendant, working under the direction and supervision of a section boss or foreman of the defendant company, assisting in building a culvert on defendant's line of railroad, and that while so engaged the injury complained of, and for which he sues, was inflicted upon him by being struck by a locomotive of a moving passenger train on the defendant's road (said train belonging to the defendant, and being operated by a conductor and engineer in its employ), and that the injury he received by coming in contact with said passenger train, and which is the injury sued for in this cause, was due solely to the misconduct and negligence of the conductor and locomotive engineer on said passenger train, in operating and conducting the movements of said train."

Upon the foregoing facts, defendant prayed for an instruction to the jury that the engineer and conductor of the passenger train were fellow servants with the plaintiff, and hence that the defendant company was not liable for the injury received by the plaintiff through their negligence. Upon the question of giving such instruction the opinions of the judges were opposed; and the circuit judge being of opinion that the plaintiff and said conductor and engineer were not fellow servants, in the sense that would exempt the defendant from liability, so instructed the jury, which returned a verdict for the plaintiff in the sum of $2,500, upon which judgment was entered. Defendant thereupon moved for a new trial, upon the granting of which the judges were opposed in opinion. The motion was denied, and the judges certified the following questions for the opinion of this court:

"(1) Whether, on the admitted facts of this case, hereinbefore set out, the jury should have been instructed that the plaintiff and said conductor and engineer were fellow servants, and that they should return a verdict for the defendant.

"(2) Whether, on the facts hereinbefore set out, the court should have set aside the verdict and judgment in the case, and granted defendant a new trial.

"(3) Whether the plaintiff, who was a common day laborer in the employ of the defendant, which is a railroad company owning and operating a line of railroad, and who was, at the time he received the injury complained of, working for the defendant under the order and direction of a section boss or foreman on a culvert on the line of defendant's road, was a fellow servant with the engineer and conductor operating and conducting a passenger train on the defendant's road, in such a sense as exempted the defendant from liability for an injury inflicted upon plaintiff by and through the negligence of said conductor and engineer in moving and operating said passenger train."

James McNaught, A. H. Garland, and H. J. May, for plaintiff in error. S. L. Glaspell, for defendant in error.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The third question certified to this court, and the only one it is necessary for us to consider, involves the inquiry whether the plaintiff, Hambly, and the conductor and engineer of the passenger train, were, either by the common law or the statute of Dakota, fellow servants, in such sense as to exempt the defendant railway from liability.

There is probably no subject connected with the law of negligence which has given rise to more variety of opinion than that of fellow service. The authorities are hopelessly divided upon the general subject, as well as upon the question here involved. It is useless to attempt an analysis of the cases which have arisen in the courts of the several states, since they are wholly irreconcilable in principle, and too numerous even to justify citation. It may be said, in general, that, as between laborers employed upon a railroad track and the conductor or other employes of a moving train, the courts of Massachusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas, and Wisconsin hold the relation of fellow servants to exist (Farwell v. Railroad Co., 4 Metc. [Mass.] 49; Clifford v. Railroad Co., 141 Mass. 564, 6 N. E. 751; Brodeur v. Valley Falls Co. [R. I.] 17 Atl. 54;

Harvey v. Railroad Co., 88 N. Y. 481; Gormley v. Railroad Co., 72 Ind. 31; Collins v. Railroad Co., 30 Minn. 31, 14 N. W. 60; Railroad Co. v. Wachter, 60 Md. 395; Railroad Co. v. Rider, 62 Tex. 267; Railroad Co. v. Shackelford, 42 Ark. 417; Blake v. Railroad Co., 70 Me. 60; Ryan v. Railroad Co., 23 Pa. St. 384; Sullivan v. Railroad Co., 11 Iowa, 421; Fowler v. Railway Co., 61 Wis. 159, 21 N. W. 40; Kirk v. Railroad Co., 94 N. C. 625; Mining Co. v. Kitts, 42 Mich. 34, 3 N. W. 240; Bridge Co. v. Newberry, 96 Pa. St. 246), while in Illinois, Missouri, Virginia, Ohio, and Kentucky the rule is apparently the other way (Railroad Co. v. Moranda, 93 Ill. 302; Sullivan v. Railway Co., 97 Mo. 113, 10 S. W. 852; Railroad Co. v. Norment [Va.] 4 S. E. 211; Dick v. Railroad Co., 38 Ohio St. 389; Railroad Co. v. Cavens' Adm'r, 9 Bush. 559; Madden v. Railway Co., 28 W. Va. 610). The cases in Tennessee seem to be divided. Railroad Co. v. Rush, 15 Lea, 145; Railroad Co. v. Robertson, 9 Heisk. 276; Haley v. Railroad Co., 7 Baxt. 239; Railroad Co. v. Jones, 9 Heisk. 27; Railroad Co. v. Gurley, 12 Lea, 46.

In this court the cases involving the question of fellow service have not been numerous, nor, perhaps, altogether harmonious. The question first arose in the case of Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. 322, in which a brakeman working a switch for his train on one track in a railroad yard was held to be a fellow servant of an engineer of another train, upon an adjacent track, upon the theory that the two were employed and paid by the same master, and that their duties were such as to bring them to work at the same place at the same time, and their separate services had, as a common object, the moving of trains. It is difficult to see why, if the case under consideration is to be determined as one of general, and not of local, law, it does not fall directly within the ruling of the Randall Case. The services of a switchman in keeping a track clear for the passage of trains do not differ materially, so far as actions founded upon the negligence of train men are concerned, from those of a laborer eugaged in keeping the track in repair. Neither of them is under the personal control of the engineer or conductor of the moving train, but both are alike engaged in an employment necessarily bringing them in contact with passing engines, and in the "immediate common object" of securing the safe passage of trains over the road. As a laborer upon a railroad track, either in switching trains, or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply. In this view, it is not difficult to reconcile the numerous cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them. The case of Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, is an illustration of this principle. The plaintiff in this case was a brakeman in defendant's yard at Bismarck, where its cars were switched upon different tracks, and its trains were made up for the road. He received an injury from a defective brake, which had been allowed to get out of repair through the negligence of an officer or agent of the company who was charged with the duty of keeping the cars in order. It was held, upon great unanimity of authority, both in this country and in England, that the person receiving and the person causing the injury did not occupy the relative position of fellow servants. See, also, Hough v. Railway Co., 100 U. S. 213; Railroad Co. v. Snyder, 152 U. S. 684, 14 Sup. Ct. 756. Even in Massachusetts, whose courts have leaned as far as any in this country in supporting the doctrine of fellow service, it has been held that agents who are charged with the duty of supplying safe machinery are not to be regarded as fellow servants with those who are engaged in operating it. Ford v. Railway Co., 110 Mass. 240.

Directly in line with the case of Randall v. Railroad Co. is that of Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397, in which the stewardess of a steamship belonging to a corporation brought suit to recover damages for personal injuries sustained by her by reason of a defective railing at a gangway, which gave way as she leaned against it, and precipitated her into the water. The railing had been recently removed, and the gangway opened, to take off some freight, and had not been properly replaced by the porter and carpenter of the ship, whose duty it was to replace them. It was held that, as the porter and carpenter were fellow servants with the stewardess, the corporation was not liable. Said Mr. Justice Blatchford: "As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow servant. The contention of the plaintiff is that as the carpenter was in the deck department, and the stewardess in the steward's department, those were different departments, in such a sense that the carpenter was not a fellow servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. * * * There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant

than the employment and service of the stewardess made her such representative." The division of the crew into departments was treated as evidently for the convenience of administration upon the vessel, but having no effect upon the question of fellow service. See, also, Railroad Co. v. Andrews, 1 C. C. A. 636, 50 Fed. 728.

The case of Railway Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, is claimed to have laid down a different doctrine, and to be wholly inconsistent with the defense set up by the railroad in this case. This action was brought by the engineer of a freight train to recover damages occasioned by the joint negligence of the conductor of his own train and that of a gravel train with which it came in collision. The case was decided not to be one of fellow service, upon the ground that the conductor was "in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants." The court drew a distinction "between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of a corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." In that particular case the court found that the conductor had entire control and management of the train to which he was assigned, directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. Under such circumstances, he was held not to be a fellow servant with the fireman, brakeman, and engineer; citing certain cases from Kentucky and Ohio, which maintained the same view.

It may be observed that quite a different question was raised in that case from the one involved here, in the fact that the liability of the company was placed upon a ground which has no application to the case under consideration, viz. that the person sustaining the injury was under the direct authority and control of the person by whose negligence it was caused. That it was not, however, intended, in that case, to lay down as a universal rule that the company is liable where the person injured is subordinate to the person causing the injury, is evident from the latest deliverance of this court, in Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, in which an engineer and fireman were held to be, when engaged in their respective duties as such, fellow servants of the railroad company, and the fireman precluded, by principles of general law, from recovering damages from the company for injuries caused by the negligence of the engineer.

Neither of these cases, however, is applicable here, since they involved the question of "subordination" of fellow servants, and not of "different departments." Of both classes of cases, however, the same observation may be made, viz. that to hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train, or two seamen of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction, either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions, unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent,—as, for example, the superintendent of a factory or railway,—and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals.

We think this case is indistinguishable in principle from Randall's case, which was decided in 1883, and has been accepted as a sound exposition of the law for over 10 years, and that, unless we are prepared to overrule that case, the third question certified must be answered in the affirmative. The authorities in favor of the proposition there laid down are simply overwhelming.

We have, thus far treated this case as determinable by the general, and not by the local, law, as was held to be proper both in the Ross case and in the case of Baugh. In so holding, however, the court had in view only the law of the respective states as expounded by their highest courts. Wherever the subject is regulated by statute, of course the statute is applied by the federal courts, pursuant to Rev. St. § 721, as a "law" of the state.

By section 3753, Comp. Laws Dak. Ter., in one of the courts of which this case was originally commenced, "an employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe." In the case of Elliot v. Railway Co., 41 N. W. 758,—a case which arose after the enactment of the above statute,—the supreme court of the territory held that a section foreman and a train conductor were coemployes, within the purview of this statute, and were "engaged in the same general business." While this construction, given by the supreme court of a territory, is not obligatory upon this court, it is certainly en-

titled to respectful consideration, and in a doubtful case might well be accepted as turning the scale in favor of the doctrine there announced. The opinion is a very elaborate one, reviews a large number of cases, and follows those of New York, Pennsylvania, and Massachusetts, as founded upon sounder principles. We may safely assume that the construction thus given to this statute will not be overruled by the courts of the two states which have succeeded the supreme court of the territory, without most cogent reasons for their action.

The third question certified must be answered in the affirmative.

Mr. Chief Justice FULLER, Mr. Justice FIELD, and Mr. Justice HARLAN dissented.

Cf. Washington & Georgetown R. R. Co. v. McDade (1890) 135 U. S. 554, 10 Sup. Ct. 1044.

Denial of motion for new trial. Fellow-servant doctrine. Night train-dispatcher. Degree of care required in selection. Measure of an employer's duty. Care usual on the part of other employers.

WABASH RAILWAY CO. v. McDANIELS.

(107 U. S. 454, 2 Sup. Ct. 932.)

Supreme Court of the United States, May 7, 1883.

In error to the circuit court of the United States for the district of Indiana.

This was an action to recover damages for injuries sustained by the plaintiff, the defendant in error here, from a collision between two freight trains belonging to the Wabash Railway Company, a corporation engaged in the business of carrying freight and passengers for hire. The collision took place on the night of August 17, 1877, near Wabash, Indiana. The jury returned a verdict in favor of the plaintiff for $15,000. A motion for new trial having been made and overruled, the case has been brought to this court for review. The action proceeded mainly upon the ground that McHenry, a telegraphic operator in the service of the company, was incompetent for the work in which he was engaged, and that his incapacity to meet the responsibilities of his position could, by reasonable care, have been ascertained, and, in fact, was known to the company at, before, and during the time of his employment. The essential facts bearing upon the question of the company's negligence in employing McHenry are summarized in one of the paragraphs of the charge to the jury to which, so far as the facts which the evidence tended to establish are stated, there seems to have been no exception. They are: "The tenth night after McHenry went on duty as night operator he went to sleep at his post of duty, with the result already stated. He was 17 years old but a few weeks before his employment. In June, 1876, he went into the service of the defendant, at Wabash, as a messenger boy, and continued in that service some 12 months, during which time he was instructed by Waldo, the day operator, in the art of telegraphy. For this instruction Waldo exacted and received, as compensation, McHenry's wages, $10 per month. For a month or more before McHenry's employment as night operator he worked in the country, harvesting. The only knowledge that he had of telegraphy was what he acquired under Waldo, and before taking charge as night operator he had never been employed anywhere or in any capacity as operator. He was not competent, as he told you, to take press reports, but was competent, as he thought, and as Waldo and Wade (the latter his predecessor as night operator) thought, to do ordinary business, and to discharge the duty of night operator at Wabash; his habits were good, and he was bright and industrious. Waldo had recommended McHenry to Simpson, the chief train dispatcher at Ft. Wayne, as capable and faithful, and without knowing McHenry personally, or even seeing him, and on Waldo's recommendation and what Simpson knew of McHenry's skill from having occasionally noticed at Ft. Wayne his fingering the key at Wabash, Simpson directed Waldo to employ McHenry at $50 a month; or, according to Waldo's testimony, he was directed by Mr. Simpson to put McHenry in charge of the office. McHenry's father told Waldo, before the son entered on the discharge of his duties, that Waldo should have $10 a month of the son's wages if Waldo would continue to give the son attention, to which Waldo assented. This is the father's testimony. Waldo admits that the father made the proposition to him as stated, but says he replied that the son was competent to take charge of the office and run it without assistance. Boys no older than McHenry had successfully discharged the duties of day and night dispatcher on this and other roads, and it seems to have been the custom of the company to educate its telegraph operators while serving as messenger boys. Other railroad companies, it seems from the evidence, have pursued the same course with satisfactory results."

Wager Swayne and Chas. B. Stuart, for plaintiff in error. E. E. McKay and Wm. Stone Abert, for defendant in error.

HARLAN, J. That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for new trial, based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the record. Railroad Co. v. Fraloff, 100 U. S. 31.

We also remark, before entering upon the consideration of the matters properly presented for determination, that it is unnecessary to express any opinion upon the question whether the plaintiff and McHenry were fellow-servants, within the meaning of the general rule that the servant takes the risks of dangers ordinarily attending or incident to the business in which he voluntarily engages for compensation, including the carelessness of his fellow-servants. The plaintiff took no exception to the instructions, which proceeded upon the ground that plaintiff and McHenry were fellow-servants, and that in accepting employment from the company they risked the negligence of each other in the discharge of their respective duties. As no such question can arise upon the present writ of error, we pass to the examination, as well of the instructions to which the defendant excepted, as of those asked by it which the court refused to give.

At and before the time of the accident the plaintiff was a brakeman in the service of the defendant. When injured he was at his post of duty on one of the colliding trains. The collision, it is conceded, was the direct

result of negligence on the part of McHenry, one of defendant's telegraphic night-operators, who was assigned to duty at a station on the line of its road. He was asleep when one of the trains passed his station, and ignorant, for that reason, that it had passed, he misled the train dispatcher at Fort Wayne as to its locality at a particular hour of the night. In consequence of the erroneous information thus conveyed to the train dispatcher, the trains were brought into collision, whereby the plaintiff lost his leg, and was otherwise seriously and permanently injured.

The court charged the jury, in substance, that the position of a telegraphic night-operator upon the line of a railroad was one of great responsibility, the lives of passengers and employés on trains depending upon his skill and fidelity; that the company "was bound to exercise proper and great care to get a person in all respects fit for the place;" that while the defendant did not guaranty to its servants the skill and faithfulness of their fellow-servants, its duty was "to use all proper diligence in the selection and employment of a night-operator," and to discharge him, after being employed, if it learned or had reason to believe he was incompetent or negligent; that the plaintiff had a right to suppose that the company "would use proper diligence in the selection of its telegraphic operators and all other employés whose incapacity or negligence might expose him to dangers, in addition to those which were naturally incident to his employment;" that "what will amount to proper diligence on the part of the master in the selection of a servant for a particular duty will in part depend on the character and responsibility of that duty;" that "the same degree of diligence which is required in the employment of a locomotive engineer would not be required in the employment of a fireman;" that "sound sense and public policy require that railroad companies should not be exempt from liability to their employés for injuries resulting from the incompetency or negligence of co-employés, when, by the exercise of proper diligence, such injuries might be avoided;" that the presumption is that the defendant "exercised proper diligence in the employment of McHenry, and the burden of proof of showing the contrary is upon the plaintiff;" but "if from any cause McHenry was not a fit person to be intrusted with the responsible duties of night-operator, and the defendant knew that fact, or by reasonable diligence might have known it, it is liable, for it is admitted that the plaintiff's injuries were the direct result of McHenry's negligence, and there is no proof that the plaintiff contributed to the accident by his own negligence."

To each of these instructions the defendant excepted at the time, and in proper form.

Among those asked by the company, and for the refusal to give which error is assigned, is one which presents the distinction between the propositions of law presented to the jury for its guidance, and those which the railroad company requested to be given. It is as follows: "Although McHenry may have been and was guilty of negligence, and that negligence may have caused and did cause the collision which resulted in the injury to the plaintiff complained of, still the plaintiff cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence, either in the appointment of said McHenry, or in retaining him in his position; and to establish such negligence on the part of the defendant, not only the incompetency of said McHenry must be shown, but it must be shown that defendant failed to exercise ordinary care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of the defendant, or to some agent or officer of defendant having power to remove said McHenry."

The court modified this instruction by striking out the word "ordinary" in the only place where it occurred, and inserting in lieu thereof the word "proper." Thus modified the instruction was granted; the defendant excepting, at the time, to the refusal to give the instruction in the form presented.

The main contention of the defendant is that the jury were instructed that the duty of the company was to observe "proper and great care," when they should have been instructed that only ordinary care was required in the appointment and retention of its employés. The former degree of care, it is contended, is matter of opinion upon a question of law, while the latter is a question of fact. And the argument of counsel is that the question of ordinary care is to be determined by the usages or custom which obtain in railroad management, and therefore the proper inquiry is not what ought to be, but what is, the general practice in that business; that what the servant is presumed to know, and to have accepted as the basis of his employment, is the practice or custom as it is when, in hiring his services, he risks the dangers incident to his employment; that the law presumes that master and servant alike contract with reference to that which is equally within their observation and inquiry. Consequently, the company was required, in the selection of plaintiff's fellow-servants, whose negligence might endanger his personal safety, not to observe "proper and great" (which counsel insists mean peculiar) care, but only that degree of diligence which the general practice and usage of railroad management sanctioned as sufficient.

In Hough v. Railway Co., 100 U. S. 213, it was decided that among the established exceptions to the general rule as to non-liability of the common employer to one employé for the negligence of a co-employé in the

same service, is one which arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master; that the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter; and that it is implied in the contract between the master and the servant that, in selecting physical means and agencies for the conduct of the business, the master shall not be wanting in proper care. It was further said that the obligation of a railroad company, in providing and maintaining, in suitable condition, machinery and apparatus to be used by its employés, is the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered; and that "its duty in that respect to its employés is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés."

These observations, as to the degree of care to be exercised by a railroad corporation in providing and maintaining machinery for use by employés, apply with equal force to the appointment and retention of the employés themselves. The discussion in the adjudged cases discloses no serious conflict in the courts as to the general rule, but only as to the words to be used in defining the precise nature and degree of care to be observed by the employer. The decisions, with few exceptions, not important to be mentioned, are to the effect that the corporation must exercise ordinary care. But according to the best-considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care, in the selection and retention of servants and agents, implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered. In substance, though not in words, the jury were so instructed in the present case. That the court did not use the word "ordinary" in its charge is of no consequence, since the jury were rightly instructed as to the degree of diligence which the company was bound to exercise in the employment of telegraphic night-operators. The court correctly said that that was a position of great responsibility, and, in view of the consequences which might result to employés from the carelessness of telegraphic operators, upon whose reports depended the movement of trains, the defendant was under a duty to exercise "proper and great care" to select competent persons for that branch of its service. But that there might be no misapprehension as to what was in law such care, as applicable to this case, the court proceeded, in the same connection, to say that the law presumed the exercise by the company of proper diligence, and unless it was affirmatively shown that the incapacity of McHenry when employed, or after his employment and before the collision, was known to it, or by reasonable diligence could have been ascertained, the plaintiff was not entitled to recover. Ordinary care, then,—and the jury were, in effect, so informed,—implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employé, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise.

These observations meet, in part, the suggestion made by counsel, that ordinary care in the employment and retention of railroad employés means only that degree of diligence which is customary, or is sanctioned by the general practice and usage which obtains among those intrusted with the management and control of railroad property and railroad employés. To this view we cannot give our assent. There are general expressions in adjudged cases which apparently sustain the position taken by counsel. But the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which, at all times, should characterize the intercourse between officers of railroad corporations and their employés. It should not be presumed that the employé sought or accepted service upon the implied understanding that they would exercise less care than that which prudent and humane managers of railroads ought to observe. To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars,—a branch of the company's service of which he can have little knowledge, and with the employé specially engaged therein he can ordinarily have little intercourse,—is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an employé—in respect of the fitness of co-employés whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is

evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due or reasonable or proper care, and therefore not ordinary care, within the meaniug of the law.

It is further objected to the charge that the court below confounded the degree of care owed as a duty to passengers with the degree of care to be observed in the case of employés. This objection necessarily rests upon the assumption that the instruction as to the exercise of "proper and great care" in the selection of telegraphic night-operators, accurately stated the degree of diligence to be observed as between the railroad company and passengers. But, clearly, the statement in the charge that the lives of both passengers and employés depended upon the skill and fidelity of telegraphic operators employed by the corporation in connection with the movement of its trains, was not for the purpose of indicating, with legal precision, the degree of care upon which passengers could rely in all matters affecting their safety. They, at least, have the right to expect the highest or utmost; not simply a great degree of diligence on the part of passenger carriers and all persons employed by them. The reference, therefore, to passengers, in the instructions alluded to, was not calculated to make the impression that employés could count upon the same degree of care that is required by law towards passengers. Whether, in the selection and retention of telegraphic operators, upon whose capacity and watchfulness largely depends the personal safety of employés on trains, a corporation should or not exercise the same degree of care which must be observed in the case of passengers, it is not necessary now to consider or determine. It is sufficient to say that the corporation was bound, in the appointment and retention of such operators, to observe, as between it and its employés, at least the degree of care indicated in the charge to the jury.

Among the instructions asked in behalf of the company, the refusal to give which is the basis of one of the assignments of error, is the following: "To render the carelessness of said McHenry the carelessness of the defendant, or to render the defendant liable for the same, it is incumbent on the plaintiff to prove that said McHenry was appointed to or retained in his position as telegraph operator with knowledge on the part of the company, or some officer or agent of the company having the power of appointment or removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable diligence on the part of the defendant, or of such officer or agent of the defendant."

It is now complained that the refusal to give this instruction was practically a declaration to the jury that the company was responsible for knowledge which it had through any of its agents or through its agents generally; whereas it was liable only for the negligence or omission of those of its agents who were charged with the duty of selecting and controlling its employés and its general business. It is sufficient to say that this point—assuming the instruction in question to be correct—was covered by the last clause of the instruction to which our attention was first directed, and in terms quite as favorable to defendant as it was entitled to uuder the law. The court, in that instruction, expressly said that to establish the alleged negligence, not only the incompetency must be shown, "but it must be shown that the defendant failed to exercise proper care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of defendant, or to some agent or officer of defendant having power to remove said McHenry."

It is not necessary to further extend the discussion of the questions pressed upon our consideration. We are of opinion that the case, in all of its aspects, was fairly placed before the jury in the instructions given by the court. No substantial error of law was committed to the prejudiee of the company, and the judgment must be affirmed.

Who are passengers? Employee riding free. Penal statute. Release of damages by decedent.

DOYLE v. FITCHBURG R. R. CO.

(162 Mass. 66, 37 N. E. 770, 44 Am. State Rep. 335.)

Supreme Judicial Court of Massachusetts. Middlesex. June 29, 1894.

Exceptions from superior court, Middlesex county; James R. Dunbar, Judge.

Action by James Doyle, as administrator, against the Fitchburg Railroad Company. To a judgment for plaintiff, defendant excepts. Exceptions overruled.

Allin & Mayberry, for plaintiff. Geo. A. Torrey, for defendant.

MORTON, J. It is conceded that the death of the plaintiff's intestate was due to the gross negligence of an engineer in the employ of the defendant. The defense rests on two propositions: First, that the plaintiff's intestate was not a passenger, but an employé; secondly, if that is not so, that the defendant is not liable, by reason of the conditions on the back of the ticket. The statute is as follows: "If by reason of the negligence * * * of a corporation operating a railroad * * * or of the unfitness, or gross negligence or carelessness of its servants * * * while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger, or in the employment of such corporation is lost, the corporation shall be punished." Pub. St. c. 112, § 212. We do not think that, at the time of the injury, the plaintiff's intestate was in the employment of the defendant, within the meaning of the statute. The defendant was not transporting him to or from the place of his daily labor pursuant to the arrangement which existed between them. It had no control or authority over him. He was not traveling on any service for it. His time was his own, and the defendant was not paying him for it. He could use it as he saw fit, and was passing over the defendant's road entirely for his own business or pleasure. So long as he was working from day to day for the defendant, it might be said, in a popular sense, that he was in its employment; but we do not think that is the sense in which the words are used in the statute. Otherwise, if, at any time, under any circumstances, passing over the railroad on a highway crossing, on Sunday, for instance, on an errand to get a doctor for his father or a friend, he was injured by the gross negligence of the defendant's servants while engaged in its business, he would have no right of recovery. Nothing but the plainest language would warrant such a result.

Was he a passenger? The question is a more difficult one, and there is force in the argument which is urged that to hold that he was a passenger would subject the defendant to a higher degree of care towards him when traveling on its road on his own pleasure than when traveling pursuant to some purpose connected with his service as an employé. Nevertheless, we think that he must be regarded as having been a passenger. It is clear that a person may at one time be an employé when passing over a railroad, and at another time, in passing over the same road, be a passenger, though continuing all the while, in a popular sense, in the employment of the railroad company. The ticket on which the plaintiff's intestate was riding was not a mere gratuity. It furnished part of the consideration by which he was induced to enter the employment of the defendant. A ticket was given to him each month, and it contained more rides than were necessary in traveling to and from his work. It is expressly conceded that persons holding these tickets could use them for their own private interest or pleasure; and we think the result must be that the plaintiff's intestate held towards the defendant the relation of a passenger at the time when he was injured. The cases to which the defendant has referred us are distinguishable from this. Those in this state were where the plaintiff was being transported in immediate connection with his employment. Gillshannon v. Railroad Co., 10 Cush. 228; Seaver v. Railroad Co., 14 Gray, 466; Gilman v. Railroad Co., 10 Allen, 233; O'Brien v. Railroad Co., 138 Mass. 387. In the cases in other states the circumstances under which the injuries occurred were such that the plaintiff could at the time fairly be said to be in the employ of the defendant. Russell v. Railroad Co., 17 N. Y. 134; Vick v. Railroad Co., 95 N. Y. 267; Abend v. Railroad Co., 17 Am. & Eng. Ry. Cas. 614; Railroad Co. v. Ryan, 82 Tex. 565, 18 S. W. 219; Railroad Co. v. Phillips (Ala.) 13 South. 65; Sugar Co. v. Riley, 50 Kan. 401, 31 Pac. 1090; Railroad Co. v. Maddux (Ind. Sup.) 33 N. E. 345; Manville v. Railroad Co., 11 Ohio St. 417; O'Connell v. Railroad Co., 20 Md. 212; Hutchinson v. Railroad Co., 5 Exch. 343; Tunney v. Railroad Co., L. R. 1 C. P. 291.

Considering the effect of the contract on the back of the ticket, the fact that the statute is a penal one must be borne in mind. The word "damages" is not used in a strictly legal sense. Sackett v. Ruder, 152 Mass. 403, 25 N. E. 736. Damages are to be assessed not less and not more than a certain amount, and with reference to the degree of culpability of the corporation, its servants or agents. Originally, the remedy was by indictment. Afterwards it was extended to an action of tort. St. 1871, c. 381, § 49; St. 1874, c. 372, § 163; St. 1881, c. 199, §§ 1, 6. But only one of the remedies can be pursued by the executor or administrator; and, whether the amount is received by the indictment or in an action of tort, it goes, in either case, to the widow and children or next of kin, and the executor or administrator has no interest in it. It is, in substance, a penalty given to the widow and children

and next of kin, instead of the estate, and, as such, the intestate could not release the defendant from liability for it. Com. v. Vermont & M. R. Co., 108 Mass. 7, 12; Com. v. Boston & L. R. Co., 134 Mass. 211; Littlejohn v. Railroad Co., 148 Mass. 478, 482, 20 N. E. 103. Save as a matter of convenience, the proceedings, properly enough, might be instituted by the widow and children or next of kin, if the statute permitted it, as is done in certain instances under the employer's liability act. St. 1887, c. 270, § 2. We have not found it necessary to consider whether a release of damages for causing the death of a human being is or is not justified by public policy, though a recent statute has been enacted which seems to authorize such a release by express messengers. St. 1894, c. 469, § 2. Upon that, however, we express no opinion. The result is that we think that the exceptions must be overruled, and it is so ordered.

United States corporation. Removal of causes from State to federal court. Receivers, suit against, under Act of Congress of 1887. Ancillary suit. Statute of limitations. Amendment of declaration. Suit in one State for death caused in another. Differences in statutes. Extraterritoriality of penal laws. Directing a verdict. Bill of exceptions.

TEXAS & PACIFIC RAILWAY CO. v. COX.

(145 U. S. 593, 12 Sup. Ct. 905.)

Supreme Court of the United States. May 16, 1892.

In error to the circuit court of the United States for the eastern district of Texas. Affirmed.

STATEMENT BY MR. CHIEF JUSTICE FULLER.

This was an action brought by Mrs. Ida May Cox, a citizen of Texas, in the United States circuit court for the eastern district of Texas, on the 3d of September, 1887, against John C. Brown and Lionel L. Sneldon, as receivers of the Texas & Pacific Railway Company, to recover damages for the death of her husband, Charles Cox, resulting from their negligence while operating that company's road. Judgment was rendered against Brown and Sheldon as such receivers, and Sheldon having resigned as receiver, and his resignation having been accepted by the court, Brown, as sole receiver, prosecuted this writ of error. While the writ was pending Brown was discharged as receiver, and the railway company was restored to the possession of its property, and this court, in November, 1889, with the consent of the parties, made an order substituting the Texas & Pacific Railway Company as plaintiff in error in lieu of Brown, receiver. This was done upon a stipulation "that the said Texas and Pacific Railway Company may be substituted as plaintiff in error in the above-entitled cause now pending undetermined upon writ of error in this court; such substitution, however, not to affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this court, the same as if such substitution had not been made."

The petition stated that the railway company, its lines running through Texas and Louisiana, and all its properties, were put in the hands of receivers, December 16, 1885, by order of the circuit court for the eastern district of Louisiana; that Brown and Sheldon were appointed and qualified at once as receivers, and had been ever since and were now such; and that Brown resided in the county of Dallas, Tex., and Sheldon in the state of Louisiana; that Cox was in their employment, January 6, 1887, as a freight conductor, and received the injury which resulted in his death on that day while attempting to make a coupling of cars, because of the defective condition of the cross ties and of the roadbed, through the negligence of the receivers. The injury was alleged to have been inflicted in the state of Louisiana, and it was claimed that the plaintiff was entitled to recover under the law of that state, which was set forth, as well as under that of the state of Texas, it being averred that they were substantially the same. These statutes are given, so far as necessary, in the margin.[1]

The petition further stated that Cox left no child or children, nor descendant of a child, nor father or mother, him surviving, but only the petitioner, his wife and widow. It was also alleged that the deceased suffered severe mental and physical pain from the time he was injured until he died.

The defendants demurred, assigning as grounds that the petition "does not show that this court has jurisdiction of the cause as between the plaintiff and the defendants; it does not show jurisdiction of the persons;" and that the petition "does not set out a cause of action, because it shows that Chas. Cox, the husband of the plaintiff, was killed in Louisiana, and not in the state of Texas;" and also answered denying the allegations of the petition, and charging contributory negligence. On the 16th of February, 1888, Mrs. Cox filed an amended petition, reciting that she, "leave of the court being first had, files this, her amended petition, and amending her original petition." This pleading expanded the allegations in reference to the appointment of the receivers

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[1] Texas, (2 Sayles' Civil St. pp. 26, 27:)

"Art. 2899. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

"(1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents.

"(2) When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another."

"Art. 2903. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

"Art. 2904. The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all."

Louisiana, (Voorhies' Civil Code, 1875, p. 427; Acts La. 1884, p. 94:)

"Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the surviving minor children or widow of the deceased, or either of them, and, in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parents or child, or husband or wife, as the case may be.

"Art. 2316. Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill.

"Art. 2317. We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

by the United States circuit court for the eastern district of Louisiana, and stated the entry and confirmation of the order of appointment as receivers, under ancillary proceedings, in the circuit court for the eastern district of Texas, and averred that the court had jurisdiction of subject-matter and receivers under the laws of the United States. It was further averred that Cox, in coupling the cars, as it was his duty to do, on account of the drawhead and coupling pin not being suitable for the purpose for which they were to be used, he being ignorant thereof, and of the defective condition of the tracks, was injured. The defendant filed a general denial to the amended petition, and pleaded the statute of limitations.

The demurrer to the petition and demurrer or plea to the amended petition were overruled, and the case came on for trial before a jury upon the issues joined. Evidence was adduced on both sides, and it was, among other things, admitted that the defendants were appointed receivers of the Texas & Pacific Railway Company by the circuit court for the eastern district of Louisiana, and with the powers alleged by plaintiff; and that an ancillary bill was filed in the circuit court for the eastern district of Texas, by direction, in the same case, and orders entered giving that court ancillary jurisdiction over the cause.

A verdict was returned for $15,000, and the defendants moved for a new trial, which, on plaintiff having remitted the sum of $5,000, was overruled, and judgment entered for $10,000, a certified copy of which was directed to be forwarded to the clerk of the circuit court for the eastern district of Louisiana, and called to the attention of that court. A motion in arrest was also made and denied.

Fifteen errors were assigned, which question the action of the court: (1) In maintaining jurisdiction; (2) in disallowing the plea of the statute of limitations; (3) in holding the cause of action enforceable in Texas; (4) in refusing to direct the jury to find for the defendants; (5) in refusing to give to the jury on defendant's behalf several specific instructions requested, not material to be here set forth.

John F. Dillon and *Winslow S. Pierce*, for plaintiff in error. *W. Hallett Phillips*, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The Texas & Pacific Railway Company is a corporation deriving its corporate powers from acts of congress, and was held in Pacific Railroad Removal Cases, 115 U. S 1, 5 Sup. Ct. Rep. 1113, to be entitled, under the act of March 3, 1875, to have suits brought against it in the state courts removed to the circuit courts of the United States on the ground that they were suits arising under the laws of the United States. The reasoning was that this must be so since the company derived its powers, functions, and duties from those acts, and suits against it necessarily involved the exercise of those powers, functions, and duties as an original ingredient.

These receivers were appointed by the circuit court, and derived their power from and discharged their duties subject to its orders. Those orders were entered, and all action of the court in the premises taken, by virtue of judicial power possessed and exercised under the constitution and laws of the United States.

In respect of liability, such as is set up here, the receiver stands in the place of the corporation. As observed by Mr. Justice BROWN, delivering the opinion of the court in McNulta v. Lochridge, 141 U. S. 327, 331, 12 Sup. Ct. Rep. 11: "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands."

Hence it has been often decided that the jurisdiction of the court appointing a receiver is necessarily exclusive, and that actions at law cannot be prosecuted against him except by leave of that court. Barton v. Barbour, 104 U. S. 126; Davis v. Gray, 16 Wall. 203; Thompson v. Scott, 4 Dill. 508, 512, Fed. Cas. No. 13,975.

This was the general rule in the absence of statute, but by the third section of the act of congress of March 3, 1887, (24 St. p. 552, c. 373,) as corrected by the act of August 13, 1888, (25 St. pp. 433, 436, c. 866,) it is provided—

"That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

And we are of opinion that although the injury was inflicted January 6, 1887, the suit, which was commenced on the 3d of September of that year, comes within the section.

McNulta v. Lochridge, supra, was an action brought in a state court July 13, 1887, against the receiver of a railway, to recover for the death of certain persons, alleged to have been caused by his negligence in the operation of the road, on January 15, 1887. No leave to sue had been granted by the court of the appointment of the receiver, but we held that section 3 applied, and there was no foundation for the position that the receiver was not liable to suit without such permission.

Section 6 of the act is as follows:

"That the last paragraph of section five of the act of congress approved March third, eighteen hundred and seventy-five, entitled 'An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes,' and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby, repealed: provided, that this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any state, or suit commenced in any court of

the United States, before the passage hereof, except as otherwise expressly provided in this act."

It is argued that, under this proviso, the receivership suit, having been commenced before and being pending at the time of the passage of the act, was excepted from its provisions, and that leave to sue was still required. We do not think so. The proviso was intended to prevent the loss of jurisdiction by reason of the repeal of prior acts and parts of acts, but it does not limit the operation of the express provisions of section 3.

As jurisdiction without leave is maintainable through the act of congress, and as the receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the circuit court in the exercise of its judicial powers, we hold that jurisdiction existed because the suit was one arising under the constitution and laws of the United States; and this is in harmony with previous decisions. Buck v. Colbath, 3 Wall. 334; Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. Rep. 289; Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. Rep. 677. The objections raised in respect of the matter of diverse citizenship cannot, therefore, be sustained.

It is said further that jurisdiction over the receivers, personally, was lacking, because defendant Brown resided in the northern district of Texas and defendant Sheldon was an inhabitant of Louisiana; and that under the act of 1887 the action could not be instituted in a district whereof neither of the defendants was an inhabitant. If the suit be regarded as merely ancillary to the receivership, the objection is without force, but, irrespective of that, this immunity is a personal privilege which may be waived. The defendants not only demurred, but answered, and the second ground of demurrer was that the petition did not set out a cause of action. Under such circumstances they could not thereafter challenge the jurisdiction of the court on the ground that the suit had been brought in the wrong district. Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. Rep. 982; Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. Rep. 36; Bank v. Morgan, 132 U. S. 141, 10 Sup. Ct. Rep. 37.

The statutory limitation in Louisiana and in Texas, upon the right of action asserted in this case, was one year, and that defense was interposed to the amended petition, which was not filed until that period had elapsed. It is put, in argument, upon two grounds: (1) That jurisdiction did not appear by the original petition; (2) that the amended petition set up a new cause of action. Assuming that the first ground is open to consideration, as brought to our attention, it is sufficient to say that, in the light of the observations already made, the fact that jurisdiction existed was sufficiently apparent on the first pleading. As to the second ground, it is true that if the amended petition, which may, perhaps, be treated as equivalent to a second count in a declaration, had brought forward a new and independent cause of action, the bar might apply to it, (Sicard v. Davis, 6 Pet. 124;) yet, as the transaction set forth in both counts was the same, and the negligence charged in both related to defective conditions in respect of coupling cars in safety, we are not disposed by technical construction to hold that the second count alleged another and different negligence from the first.

Counsel further urge, with much earnestness, that the cause of action founded upon the statute of Louisiana conferring the right to recover damages for an injury resulting in death was not enforceable in Texas.

The action, being in its nature transitory, might be maintained if the act complained of constituted a tort at common law, but, as a statutory delict, it is contended that it must be justiciable, not only where the act was done, but where redress is sought. If a tort at common law where suit was brought, it would be presumed that the common law prevailed where the occurrence complained of transpired, but, if the cause of action was created by statute, then the law of the forum and of the wrong must substantially concur in order to render legal redress demandable.

In The Antelope, 10 Wheat. 66, 123, Mr. Chief Justice MARSHALL stated the international rule, with customary force, that "the courts of no country execute the penal laws of another;" but we have held that that rule cannot be invoked as applicable to a statute of this kind, which merely authorizes "a civil action to recover damages for a civil injury." Dennick v. Railroad Co., 103 U. S. 11. This was a case instituted in New York to recover damages for injuries received and resulting in death in New Jersey, and it was decided that a right arising under or a liability imposed by either the common law or the statute of a state may, where the action is transitory, be asserted and enforced in any court having jurisdiction of such matters and of the parties.

And, notwithstanding some contrariety of decision upon the point, the rule thus stated is generally recognized and applied where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.

The statutes of these two states on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the state of Texas.

In Willis v. Railroad Co., 61 Tex. 432, it was held by the supreme court of Texas that suit could not be brought in that state for injuries resulting in death inflicted in the Indian Territory, where no law existed creating such a right of action. The opinion goes somewhat further than this in expression, but in that regard has not been subsequently adopted.

In Railway Co. v. Richards, 68 Tex. 375, 4 S. W. Rep. 627, it was said that, while there was some conflict of decision, it seemed to be generally held that a right given by the statutes of one state would be recognized and enforced in the courts of another state, whose laws gave a like right under the same facts. In Railroad Co. v. McCormick, 71 Tex. 660, 9 S. W. Rep.

540, the supreme court declined to sustain a suit in Texas by a widow for damages for the negligent killing of her husband in Arkansas, for the reason that the statutes of Arkansas were so different from those of Texas in that regard that jurisdiction ought not to be taken, but the court indicated that it would be a duty to do so in transitory actions where the laws of both jurisdictions were similar. The question, however, is one of general law, and we regard it as settled in Dennick v. Railroad Co., supra.

But it is insisted that the general rule ought not to be followed in this case because the statute of Texas giving a right of action for the infliction, through negligence, of injuries resulting in death, does not apply to persons engaged as receivers in the operation of railroads, and reference is made to Turner v. Cross, decided February 5, 1892, and reported in advance of the official series in 18 S. W. Rep. 578, (followed by Railway Co. v. Collins, [19 S. W. Rep. 365,] decided March 22, 1892, and furnished to us in manuscript,)[1] in which the supreme court of Texas so held upon the ground that a receiver is not a "proprietor, owner, charterer, or hirer" of the railroad he has in charge, and so not within the terms of the Texas statute. Without questioning the correctness of this view, still it would be going much too far to attribute to these decisions the effect of a determination that an action could not be maintained against receivers in the enforcement of a cause of action arising in Louisiana, whose statute is not open to such a construction.

We are brought, then, to consider whether reversible error intervened in the conduct of the trial. The contention on this branch of the case is chiefly that the court should have directed a verdict for the defendants because there was no evidence of negligence on their part, while there was evidence of contributory negligence on the part of Cox.

The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish. Dunlap v. Railroad Co., 130 U. S. 649, 652, 9 Sup. Ct. Rep. 647; Kane v. Railroad Co., 128 U. S. 91, 9 Sup. Ct. Rep. 16; Jones v. Railroad Co., 128 U. S. 443, 9 Sup. Ct. Rep. 118.

We think the evidence given in the record tended to establish that the coupling apparatus and the track were in an unsafe and dangerous condition, that the injury happened in consequence; and that these defects were such as must have been known to the defendants under proper inspection, and unless they were negligently ignorant. No conflict appears as to the condition of the roadbed in the railroad yard, but there was testimony on defendants' behalf indicating that the coupling apparatus was not substantially defective.

The bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed.

No exception was taken to the admission or exclusion of evidence, and none to any part of the charge of the court, which is given in full. Among other things, the court instructed the jury:

"If you shall find either that the roadbed was not unsafe or dangerous, although not of the best character, or that the coupling pin used was not unsafe or dangerous, although not as well adapted for use as a round pin, then you will find for defendant.

"And, again, if you shall find from the evidence that both the roadbed and coupling pin were unsafe and dangerous, yet if you shall find from the evidence that neither of these causes resulted in the death of Chas. Cox, nor were the proximate causes producing the injuries whereof he died, then you will find for the defendant.

"It is incumbent on the plaintiff, before she can recover, not only to prove that the defects complained of existed, but also that they or one of them were the cause of death.

"If the death was the result of accident, misadventure, or the want of care or prudence on the part of deceased, or other cause not complained of, plaintiff cannot recover.

"You must ascertain the true nature of the case, and the actual cause of death, from the evidence as adduced before you, and render your verdict in accordance therewith."

Twelve specific instructions were asked on behalf of defendants, and refused, and exceptions taken, but, except as stated, they are not insisted upon in argument, and we think they were substantially covered by the charge as given.

Some emphasis is put upon the fact that the car which inflicted the injury was from another road, but that circumstance does not call for special mention, in the view we take of the case, and does not seem to have been relied on in the court below. The circuit court correctly applied well-settled principles in the disposition of the questions of law arising upon the trial, and it would subserve no useful purpose to retraverse, in exposition of those principles, ground so often covered. Railroad Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590; Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. Rep. 653; Kane v. Railway, 128 U. S. 91, 9 Sup. Ct. Rep. 16; Hough v. Railway Co., 100 U. S. 213; Railroad v. Horst, 93 U. S. 291.

Judgment affirmed.

[1] 84 Tex. 121.

Negligence defined. Proximate cause. Intervening cause. Gross negligence. Comparative negligence. Failure to fence tracks. Cattle seen on tracks in time to avoid collision. Negligence, when a question of law. Duty of owner as to restraining cattle. Burden of proof as to contributory negligence. Duty of jury to look at all the circumstances. Paramount duty of company to look out for safety of its passengers. Speed of train. Refusing a new trial.

WASHINGTON v. BALTIMORE & OHIO R. R. CO.

(17 W. Va. 190, 10 Am. & Eng. R. R. Cases, 749.)

Supreme Court of Appeals of West Virginia. Nov. 20, 1880.

On August 29, 1874, Ella B. Washington instituted in the circuit court of Jefferson county an action on the case against the Baltimore and Ohio R. R. Co., claiming $450.00 damages. Her declaration alleged, that on August 15, 1874, she was possessed of three valuable horses in said county, which were then without any fault of the plaintiff on the railway of the defendant, and that the defendant by its servants so carelessly, unlawfully and improperly ran its steam-engine, that by its carelessness and negligence the steam-engine then and there struck and ran over these three horses of the plaintiff, and thereby wounded one of said horses, and killed the other two. The defendant demurred to this declaration, and the court overruled the demurrer; and the defendant thereupon pleaded not guilty, and issue was joined thereon. The issue was tried by a jury, who rendered a verdict in favor of the plaintiff for $200.00. The defendant moved the court to set aside the verdict, and to grant it a new trial, which motion the court overruled; and on March 28, 1878, the court rendered a judgment against the defendant in accordance with this verdict. To this judgment a writ of error and supersedeas was awarded by this court.

It appears by the record, that there was evidence offered by the plaintiff, which proved, that on August 24, 1874, just before an express train going east was due, she was sitting at an upper window of her house, which overlooked the railroad for three-fourths of a mile, when she discovered that her two grown horses and a colt had escaped from her yard into her meadow, through which the railroad ran; and at the same time she heard her brother calling a servant, and saw her little boy running down the hill trying to get the stock back; that her brother, son and servant continued their efforts to drive the horses back; but they ran on down the meadow and came upon the railroad track just above a cattle-stop between the meadow and the adjoining field below; that just as the horses got on the railroad-track she heard the train approaching at a crossing a distance above of seven hundred and seventy yards; that it ran at its usual speed, no whistle being blown, nor, as far as she could judge, was any attempt made to apply the brakes; that the railroad-track where the accident occurred was perfectly straight for five hundred and fifty-two yards, and there was a full view of the track for six hundred and sixty yards above the place, where the horses were killed; that the parties engaged in endeavoring to get the horses off the track and to drive them back into the yard did their best to effect their object, but failed; but none of them made any effort to signal the train; that an alert engineer could have seen these parties endeavoring to get the horses off the track, and that the train could have been stopped in a space of three hundred yards; that the horses had gotten out of the yard through a gate which some one had left open.

The defendant, on the contrary, introduced evidence to show, that the engineer first saw the horses when the train was within thirty or forty yards of this cattle-stop; that the train was running thirty or thirty-five miles an hour; that as soon as he saw the horses, he blew the whistle and threw on the air-brakes; that when the train got within twenty or thirty yards of a certain culvert, the horses ran upon the track, and tried to cross on the culvert, when they were struck; that the train was stopped before it had entirely passed over the culvert. The engineer testified, that he was watching the track, and when he first saw the horses they were eating in the fence corner. The defendant also introduced evidence to prove, that the train could be stopped with the brakes used in eight hundred or one thousand feet running at the speed at which it was running. The whistle was blown, the air-brakes applied, and the train stopped within this distance.

The defendant's counsel moved the court to grant these instructions marked A, B and C, as follows:

Defendant's Instruction A: "The court instructs the jury that if they believe from the evidence that after the discovery by the plaintiff of her horses upon or near the road of defendant, and in a position of danger, she, by the use of due diligence on her part and that of her servants, could have driven her said horses off from said road, and prevented their being killed or injured by defendant, or could, by the use of due diligence on her part and that of her servants, have warned the defendant of threatened danger by signal or otherwise, and thus have prevented their being killed or injured, and she failed in either respect so to do, then the plaintiff is guilty of contributory negligence, and cannot recover."

Defendant's Instruction B: "The court instructs the jury that there is no law in this state by which railroad companies are required to fence their roads for the protection of other persons' domestic animals; that domestic animals found upon the track of such roads are wrongfully there; and that, when discovered, the first and paramount duty of the engineer is to provide for the safety of passengers and property upon the

train, and after that to avoid unnecessary injury to such animals, if it can be done by the exercise of ordinary and reasonable care."

Defendant's Instruction C: "The court instructs the jury that the defendant has the right to regulate the management and speed of their trains solely with reference to the security of persons and property in their charge, and may make their plans upon the reasonable and legal presumption that the owners of domestic animals will keep them at home, and not suffer them to stray upon the track of a railway, unless they are prepared to incur the legitimate hazards of such an exposure."

But the court declined to grant instructions "B" and "C," and declined to grant instruction "A" as prayed, but appended to said instruction "A" the following modification:

"Unless they further find that after the cattle were discovered, or ought to have been discovered, by the defendant by the use of ordinary diligence, the defendant failed to use ordinary precaution to avoid their injury."

To which action of the court in refusing to grant his instructions "B" and "C," and in refusing to grant his instruction "A" as prayed, and in appending thereto the modification above recited, the defendant excepted, and prayed that his bill of exceptions might be signed, sealed and enrolled, which was accordingly done.

The defendant obtained from this court a writ of error and supersedeas to the judgment of the court in this case.

Baylor & Wilson, for plaintiff in error.
David B. Lucas, for defendant in error.

GREEN, P. (after stating the facts as above). This record imposes on the court the duty of determining what is negligence, and when the court should instruct the jury what acts of commission or omission, as a question of law, amount to negligence, and when it should confine itself to instructing the jury generally what constitutes negligence generally, and then leave it to the jury to determine whether the evidence, taken altogether, proves negligence, without attempting to influence the jury by saying that certain acts would or would not amount to negligence; and also to determine what character of conduct on the part of the plaintiff amounts to such contributory negligence as precludes him from recovering.

Negligence is the doing of something which under the circumstances a reasonable person would not do, or the omission to do something in discharge of a legal duty which under the circumstances a reasonable person would do, and which act of commission or omission, as a natural consequence, directly following produces damage to another. Negligence can be based on omissions only when there is a legal obligation on the party to do the omitted acts. If such legal obligation exists, negligence may arise either from the non-performance or mal-performance of the duty imposed by law. Of course, negligence cannot be attributed to an irresponsible person, as an idiot or small child; and even when the party is responsible, the circumstances in which he is placed must be considered in determining whether he be negligent. If the circumstances are such as naturally cause him great excitement, the law does not require him to exhibit the coolness and to exercise the sound judgment which would be required of him under other circumstances. Stokes v Saltonstall, 13 Pet. 181; Johnson v. Railroad Co., 70 Pa. St. 358.

The act or omission which constitutes negligence must be such as directly produces as its natural consequence an injury to another. And therefore if a party do an act which might naturally produce an injury to another as its consequence, but, before any such injury results, a third person does some act or omits to perform some act which it was his duty to perform, and this act or omission of such third person is the immediate cause of an injury, which would not have occurred but for his negligence, such third person is responsible for such injury, and not the party guilty of the first negligence; for the casual connection between the first act of negligence and the injury is broken by the interposition of the act or omission of the third party. And this act or omission of the third party is in law regarded as the cause of the injury, and the act of the first party is in law regarded as a mere condition, according to the maxim: "In jure non remota causa sed proxima spectatur."

As a case illustrating the meaning and the scope of this maxim, we may refer to the case of Insurance Co. v. Tweed, 7 Wall. 52. Justice Miller, in delivering the opinion of the court, says: "One of the most valuable criteria furnished us by these authorities is to ascertain, whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

If between the accomplished fact and the alleged cause there has intervened the negligent act of a responsible third party sufficient to produce the misfortune, it must, it would seem clear on principle, be regarded as the cause of the misfortune, and the original negligence must be regarded as too remote to be considered as the cause. Many cases may be found which are based on the law as we have laid it down. Thus, where a butcher bought sheep of a farmer, which were fraudulently represented as sound, he cannot recover of such farmer, as special damages, such damage as has resulted to him from his customers refusing to deal with him because he was reported to have bought these diseased sheep, the court regarding this loss as caused, not by the sale to the butcher of the diseased sheep by the farmer,

but as resulting from the interposed action of the customers in refusing to deal with the butcher. See Crain v. Petrie, 6 Hill, 522.

In Carter v. Towne, 98 Mass. 507, "a minor but eight years old sued a druggist for selling him two pounds of gunpowder carelessly, he being on account of his age unfit to be entrusted with it, and that in his ignorance of its use he exploded it, and was burned. The court decided that the minor could sustain such action, but on the trial of the case it was proven, that with the knowledge of his parents this powder had been kept in their house a week, that his mother had given the boy some of the powder, and he fired it off, and some days afterwards he took more of the powder with his mother's knowledge, and fired it off, and was injured thereby. The court held, that though the druggist was negligent in selling the powder to so young a child, yet, in law, this was not the cause of his injury, there having been interposed between the sale and the accident a cause sufficient to have produced it, the negligence of his mother.

In Vicars v. Wilcocks, 8 East, 1, it was held, that special damages could not be recovered in an action of slander for the loss resulting from the wrongful discharge of the plaintiff by his master before the end of his term because of such slander. The loss was held not to have been caused by the slander, but by the wrongful act of the master subsequently in discharging the plaintiff before the end of his term.

If instead of a third person intervening by some negligent act between the alleged cause of the injury and the injury itself, the plaintiff himself should intervene and be guilty of negligence, thereby causing the injury to himself, the defendant, though he had originally been guilty of negligence which might naturally have produced an injury, cannot be held responsible for such injury, because the defendant's negligence in such case must be regarded as the remote, and not the proximate, cause of the injury. In such a case, in the language of the law-books, the plaintiff is held to have contributed to the injury; but he would more properly be said to have caused the injury to himself in such a case, as the defendant's negligence, being the remote cause, is not regarded at all, and is no part of the cause of the injury. Properly speaking, contributory negligence, as the very words import, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act, which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury, as, for example, when a person is negligently driving an omnibus in a street at a furious and unlawful speed, a person on the sidewalk seeing the omnibus thus driven carelessly tries to cross the street in front of the omnibus, and is run over, he cannot recover for the injury he sustains, as he has been in such case guilty of contributory negligence. See Woolf v. Beard, 8 Car. & P. 373 (34 E. C. L. R. 435).

On the contrary, if the act of the defendant is the immediate cause of the injury, no preceding negligence or improper conduct of the plaintiff would prevent him from recovering; for in such a case his preceding negligence or improper conduct would not be in law regarded as any part of the cause of the injury, and would not therefore be held to be contributory negligence. The plaintiff's preceding negligence or improper conduct is in such case a mere condition, and not a cause of the injury. Though it may be in such a case that the injury could not possibly have happened without this preceding negligence or improper conduct of the plaintiff, that is, without circumstances being in the actual condition in which the plaintiff had improperly placed them, he may in such case nevertheless recover; for in the view of the law, which never looks to the remote cause, which we have called a condition, but only the proximate cause, the injury in such a case would be held to be caused by the defendant only. There are very many decided cases which sustain and illustrate these views, a few of which I will cite.

In Cuff v. Railroad Co., 35 N. J. Law 32, Depue, J., says: "In other cases the intervention of the independent act of a third person between the wrong complained of and the injury sustained, which was the immediate cause of the injury, is made a test of that remoteness of damage which forbids a recovery. Ashley v. Harrison, 1 Esp. 48; Mylne v. Smith, 2 Dow, Parl. 390; Fitzsimonds v. Inglis, 5 Taunt. 534; Hoey v. Felton, 11 C. B. (N. S.) 142; Daniels v. Portler, 4 Car. & P. 262; Hadden v. Lott, 15 C. B. 411; Walker v. Goe, 4 Hurl. & N. 350; Parkins v. Scott, 1 Hurl. & C. 152; Crain v. Petrie, 6 Hill, 522; Stevens v. Hartwell, 11 Metc. (Mass.) 542; Torney v. Railway Co., 3 C. B. (N. S.) 145; Williams v. Jones, 3 Hurl. & C. 256; Morgan v. Atterton, L. R. 1 Exch. 239; Bank of Ireland v. Evans, 5 H. L. Cas. 389, 397."

In Stevens v. Hartwell, 11 Metc. (Mass.) 542, it was decided, that in action for slanderous words the plaintiff cannot prove that he sustained special damages by means of the repetition by a third person of the words uttered by the defendant.

In Murphy v. Dean, 101 Mass. 455, Wells, J., says: "The statement in Tuff v. Warman, 5 C. B. (N. S.) 573, is thus: 'If the defendants might, by the exercise of due care on their part, have avoided the consequences of the neglect or carelessness of the plaintiff, the plaintiff will not be disentitled to recover.' This, as already suggested, may be correct as applied to a case like Tuff v. Warman, where the negligence of the plaintiff was in a certain sense remote, preceding the negligent conduct of the defendant; but when the negligent conduct of the two parties is

contemporaneous, and the result of each relates directly and proximately to the occurrence from which the injury arises, the rule of law is rather that the plaintiff cannot recover, if by due care on his part he might have avoided the consequences of the carelessness of the defendant. Lucas v. Railroad Co., 6 Gray, 64; White v. Railroad Co., 9 El. & Bl. 719; Robinson v. Cone, 22 Vt. 213."

In Greenland v. Chaplin, 5 Exch. 248, Chief Baron Pollock states the rule, "that when the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action."

In Johnson v. Railroad Co., 20 N. Y. 69, Judge Denio says: "But if one make an excavation in a highway, which may or may not be the occasion of an accident to a traveler, it would be reasonable to require a party seeking damages for an injury to give general evidence that he was traveling with moderate care. Thus, in Butterfield v. Forrester, 11 East, 60, the defendant, in making some repairs to his house, had put up a pole across the road, leaving however a free passage by a street in the same direction. The plaintiff rode against it, and was injured. It being proved he was riding immoderately, it was held he could not recover."

So, in Smith v. Smith, 2 Pick. 621, the defendant had piled cordwood by the side of the highway at the foot of a hill, and one stick projected eight inches into the road. The plaintiff, on a dark night, drove an overloaded wagon down the hill, without any shaft-girth to the harness. The wagon struck the horse, and he ran alongside of the wood-pile, and against the projecting stick, and caused an injury. A verdict for the defendant was sustained by the court, on the ground that the plaintiff's conduct had contributed to the injury.

In Trow v. Railroad Co., these propositions of law are laid down by the court: "When there has been mutual negligence on the part of the plaintiff and defendant, and the negligence of each was the proximate cause of the injury, no action could be sustained. So when the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting of some other matter than that which occurred at the time of the injury, no action can be sustained. But when the negligence of the defendant is proximate, and that of the plaintiff remote, the action for the injury can well be sustained, though the plaintiff was not entirely without fault; so that if there was negligence on the part of the plaintiff, yet if, at the time when the injury was sustained, it might have been avoided by the defendant by the exercise of reaonable care and prudence, an action will lie for the injury."

The last of these propositions is sustained and illustrated by numerous cases, in which it has been held that if a defendant, in the discharge of his duties carefully, could avoid injuring a child too young to be responsible for its conduct, no amount of actual preceding negligence on the part of its parents in letting it run at large will be a good defence. Birge v. Gardiner, 19 Conn. 507; Robinson v. Cone, 22 Vt. 213; Boland v. Railroad Co., 36 Mo. 484.

It is true there are decisions to be found which are inconsistent with these decisions; but the above cases seem to be sustained by the weight of authority and reason.

Based on the same principles is the case of Davies v. Mann, 10 Mees. & W. 549, in which it was held, that though the plaintiff negligently left his donkey in a highway tied by its foot, he could nevertheless recover of a defendant who negligently drove over it. So, also, it has been held, that it is no defence to a suit for damages in a collision, that the plaintiff was at the time in a place where he ought not to have been. Greenland v. Chaplin, 5 Exch. 243. In Spofford v. Harlow, 8 Allen, 176, it was decided that "the driver of a team, which is on the left side of a street in violation of the law of the road, may nevertheless maintain an action for the injury sustained by him from a collision with another team, the driver of which in meeting him carelessly and recklessly ran into him." So too in Steel v. Bardhart, 104 Mass. 59, it was held, that "if one places his horse and wagon in a street in a city transversely to the course of the street, while loading articles which a city ordinance permits to be loaded only in vehicles placed lengthwise, and as near as possible to the sidewalk, he is not restrained by the mere fact of thus violating the ordinance from maintaining an action against one, who injures the horse by negligently driving another wagon against it, where, by exercising more care, he might have avoided doing so." So, too, a party may recover damages for an injury, the direct result of the defendant's negligence, though at the time of the injury the plaintiff was a espasser, and the injury could not have resulted to him if he had not been a trespasser, where he does not in any degree directly contribute to the bringing about of such injury. This is well illustrated by what was said in the case of Isbell v. Railroad, 27 Conn. 404.

It was there said: "A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect to say, that the complainant was first in the wrong, since inattention and accident are to a greater or less extent incident to human affairs. Preventative remedies must always be proportioned to the case in its peculiar circumstances, to

the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence. A boy enters a door-yard to find his ball or arrow, or to look at a flower in a garden; he is bitten and lacerated by a vicious bull-dog; still he is a trespasser, and if he had kept away, would have received no hurt. Nevertheless, is not the owner of the dog liable? A person is hunting in the woods of a stranger, or crossing the pasture of his neighbor, and is wounded by a concealed gun, or his dog is killed by some concealed instrument, or himself gored by an enraged bull; is he in all these cases remediless, because he is there without consent? Or an intoxicated man is lying in the travelled part of a highway, helpless, if not unconscious, must I not use care to avoid him? May I say he has no right to encumber the highway, and therefore carelessly continue my progress, regardless of consequences? Or if such a man has taken refuge in a field of grass or a hedge of bushes, may the owner of the field, knowing the fact, continue to mow, or fell trees, as if he was not so? Or if the intoxicated man has entered a private lane or by-way and will be run over, if the owner does not stop his team, which is passing through it, must he not stop them? These are instances, I am aware, of personal rights; but what is true in one relation to the person is essentially true in relation to dumb animals and other kinds of property, though perhaps the rule would be applied in the latter case with less strictness. It must be so that unnecessary injury negligently inflicted in these and kindred cases is wrong, and therefore unlawful."

The principles here stated appear to be sound, though it may be that some of the examples put may not properly apply. Whenever the plaintiff has not directly contributed to the accident, if the defendant caused it by his negligence, he is responsible.

It is unnecessary in this case to determine whether the plaintiff might not recover, though by a very slight negligence he has contributed directly to the accident, when the defendant has been guilty of gross negligence. It has been so held in Illinois and Georgia, where "comparative negligence" has been declared to be the test, and not "contributory negligence." See Railroad Co. v. Sweeney, 53 Ill. 330; Railroad Co. v. Jacobs, 20 Ill. 478; Railroad Co. v. Dewey, 26 Ill. 255; Same v. Hazzard, 26 Ill. 373; Railroad v. Gregory, 58 Ill. 272.

In other states, where this doctrine of "comparative negligence" is not recognized as law, there are yet cases decided, which it would be difficult to distinguish in principle from those cases professedly decided on the ground of "comparative negligence." See Gale v. Lisbon, 52 N. H. 174; Horton v. Ipswich, 12 Cush. 488; Mahoney v. Railroad Co., 104 Mass. 73; Brownson v. Southbury, 37 Conn. 693. But the decisions very generally, in both England and this country, lay down the rule to be, that if the plaintiff has by his negligence in any degree contributed directly to the injury complained of, he cannot recover; though this rule does not appear always to have been followed in practice. See O'Keefe v. Railroad, 32 Iowa, 467.

These principles lead us to the conclusion, that though the plaintiff be negligent in permitting his cattle to be upon a railroad track, yet, if injury to them is caused by the servants of the railroad by running over them, after they were seen on the track of the road, or after they ought to have been seen by the exercise of reasonable care, and which could have been avoided by the exercise of reasonable care, the owner of the cattle may recover against the railroad for the damages inflicted. It is true, that the decisions of the courts on this point have been very conflicting.

In California in the case of Needham v. Railroad, 37 Cal. 409, it was held: "The reason why the law does not hold the defendant responsible for damages, when the plaintiff has by his negligence or wrongful act contributed to the result complained of, is not, that the wrong of the plaintiff justifies or excuses the defendant, but because it is impossible to apportion damages between the parties; and wherever that impossibility does not exist, the defendant's exemption from liability does not exist. The rule releasing the defendant from responsibility for damages in cases where the plaintiff by his negligence or wrong contributed to the result, is confined to cases where the act of the plaintiff is the proximate cause of the injury, and proximate cause means negligence at the time of the injury; and therefore, though the plaintiff is guilty of negligence or even of possible wrong in placing his animals on a railroad track, yet the railroad company is bound to exercise reasonable care and diligence in the use of its road; and if for want of that care the animals are injured, the company is liable."

So, in Connecticut in Isbell v. Railroad Co., 27 Conn. 393, it was held, "that where the plaintiff's oxen were at large in a highway in violation of law, and went upon the railroad track, and were there injured by the negligent management of the train by the servants of the railroad, the railroad was responsible for the damages, though the cattle were trespassers. See, as justifying this conclusion, Transportation Co. v. Vanderbilt, 16 Conn. 421; Birge v. Gardiner, 19 Conn. 507; Daley v. Railroad, 26 Conn. 591; Johnson v. Patterson, 14 Conn. 1."

In Illinois, where the rule of "comparative negligence" is recognized, it has been decided "in an action against a railroad company to recover the value of cattle alleged to have been killed on the defendants' road by

their locomotive and train, where it appeared that the cattle could have been seen on the track by the engineer, if he had been on the lookout, for a distance of more than half a mile, there being nothing to obstruct the view, the engineer making no effort to avoid the danger, and never slacking the speed of the train, but rushing on at a rapid rate, without any signal to give the alarm, that it was gross negligence on the part of the engineer not to stop the train in time to avoid the danger, for which the company should be held responsible, even though the cattle were upon the track without the fault of the company." Railway Co. v. Barrie, 55 Ill. 226. And in Railway Co. v. Bray, 57 Ill. 514, it was held, "that where stock was killed upon a railroad-track, and the engineer in charge at the time could by the use of ordinary care and skill, without danger, have stopped the train in time to avoid the collision, the company is liable, though the animals were wrongfully on the track." See, also, Railway Co. v. Ingraham, 58 Ill. 120, and Railway v. Wren, 43 Ill. 77.

There have been in Illinois a number of cases, where it has been held, "that stock getting upon a railway are trespassers, and the company are not liable for injury they may sustain, unless it is occasioned by gross negligence of the railroad's servants." See Railroad Co. v. Reedy, 17 Ill. 580; Railroad Co. v. Rockafellow, 17 Ill. 541; Railroad Co. v. Thompson, 17 Ill. 131; Railroad Co. v. Patchin, 16 Ill. 198; Heade v. Rust, 39 Ill. 192.

In Iowa, in the case of Parker v. Railroad Co., 34 Iowa, 309, it was decided, "that a railroad company is bound to have in charge of its engine men of reasonable skill and judgment, and the engineers thus in charge must exercise such judgment and skill in avoiding injury to cattle on the track, having due regard to the safety of the train and passengers, in order to exonerate the company from liability."

In Kentucky, in the case of Railroad Co. v. Wainscott, 3 Bush, 151, decided in 1867, Judge Robertson, delivering the opinion of the court, says: "Had the mule been on the track far enough ahead to enable the engineer by proper means to stop the locomotive before it reached the animal, or to have enabled him to retard the train's progress until the mule could have been driven out of all danger of collision, it was his duty to see and save it; and failing so to do, the appellant would have been responsible for the value of the mule." This seems to be inconsistent with the decision of the court in Railroad Co. v. Ballard, decided in 1859 (see 2 Metc. [Ky.] 177), when the court held "that the paramount duty of a railroad company through its agents entrusted with the conduct of a train is to look to the safety of the persons and property thereon, subordinate to which it is their duty to avoid unnecessary injury to animals straying on the road. But there is a peculiar obligation upon their owners to keep them off the road. And if they are found there, whilst railroad companies, their agents and servants are not allowed to omit all care and wilfully and wantonly injure them by running engines and trains over them, yet said companies are not to be held liable for injuries inflicted under such circumstances, unless it is proved that the conduct of the companies or their agents has been reckless, wanton and wilful." To sustain which position among other cases the older Illinois cases above referred to are cited.

In Earmes v. Railroad Co., 98 Mass. 563, Chapman, J., thus states the law: "But though the sheep were trespassers, this would not authorize the defendant to kill, maim or otherwise injure them wilfully or carelessly. Even in driving off animals trespassing on one's land reasonable care must be taken. And if they get upon the track, where they may expose passing trains and the people upon the trains to great danger, the managers of the trains are still bound to use reasonable care to avoid injuring the animals, and may not carelessly run upon them. But they are not bound to presume that such animals will be found upon the track; and if they injure or destroy the animals without negligence they are liable not to the owner." In Locke v. Railroad Co., 15 Minn. 355 (Gil. 283), referring to this case among others, the court held, that "if an engineer of a railroad train saw a cow on its track, he would be bound to exercise all reasonable and proper care to avoid injuring it, and if he failed to do so, the company would be responsible, but that he had a right to presume that there was no cow on the track, and he was therefore not bound, so far at least as his duty to the plaintiff was concerned, to look ahead to see if cattle were on the track, and his failure to do so would not be such negligence as would render the company responsible to the owner of the cow."

It should be observed, as bearing upon the question whether it is a duty to the owner of cattle that the engineer should look ahead to see that cattle are not on the track, that in Massachusetts the law required the railroads to fence their tracks; and in Minnesota, at the season of the year when this cow was killed, the law required the owners of cattle to keep them at home enclosed.

The rule laid down in Mississippi, in Railroad Co. v. Miller, 40 Miss. 48, is: "The railroad company, in order to prevent injury and destruction to stock on their track, are only bound to use such reasonable care and prudence in running as a prudent man engaged in the same business would use to prevent such injury and destruction." See, also, Railroad Co. v. Patton, 31 Miss. 156.

In Raiford v. Railroad Co., 43 Miss. 329, the court says: "The plaintiff might well suffer his horses to run at large; but in so

doing he took the risk of their loss or injury by unavoidable accident. The fact that the animals were on the road did not justify the servants of the company in regarding them as there unlawfully and in violation of the rights of the company, and in any measure release the company's servants from the observance of proper care and precaution." In New York, on the contrary, it has been held by the supreme court that the owner of domestic animals straying upon the track of a railroad company and injured in a collision with its engines while operated in the ordinary manner has no remedy for the loss against the company, although it might have been avoided by the exercise of ordinary care on its part; that gross negligence even in the absence of intentional injury will not subject the company to liability. Railroad Co. v. Manger, 5 Denio, 255, 4 N. Y. 349; Clark v. Railroad Co., 11 Barb. 112; Talmidge v. Railroad Co., 13 Barb. 493; Terrey v. Railroad Co., 22 Barb. 574, 586.

In New Jersey where the law required the owner of cattle to keep them at home enclosed, it has been held, that if permitted to run at large, nothing but wilfulness on the part of the engineer, or such negligence as would amount to wilfulness, would make the company liable. See Vandegrift v. Rediker, 22 N. J. Law, 189.

In North Carolina, in Jones v. Railroad Co., 70 N. C. 626, it was decided that "where the plaintiff's horse was in his pasture, through which the defendant's road run, and was run over in the day-time by one of the engines of the defendant, it appearing on the trial that the horse, before being struck, ran some two hundred yards on the track, and there was nothing to prevent the engineer from seeing him, and no alarm was given by the engineer until about the time the horse was run over, that this was such negligence on the part of the engineer as would make the defendant liable in damages for the injury to the horse."

In Ohio, in the case of Railroad Co. v. Smith, 22 Ohio St. 244, the court considered the question whether the fact that the horses were trespassing on the track, excused the servants of the railroad company from the exercise of ordinary care; and it held, it did not; and also the question whether the additional fact that the road was fenced, excused the engineer as respects the owner of stray animals, from looking about to see whether such animals were on the track or not; and in reference thereto the court say: "They were bound to use the ordinary precautions to discover danger as well as to avoid its consequences after it became known." And again: "The fact that the road was fenced at the place of collision with the horses, was a circumstance to be considered in connection with the other circumstances of the case in determining whether the engineer was guilty of negligence, in not looking ahead to discover the danger in time to avoid it. The fact that the road was fenced rendered it less probable that wandering animals would be on the track; but it cannot be said that the engineer, as a matter of law, by reason of the fences was wholly excused from keeping a look-out ahead of the train." The instruction given, which was approved by the court, was: "That the defendant had the right to the free and unobstructed use of its railroad-track, and that the paramount duty of its employes was the protection of the passengers and property in the train, and the train itself. But this being their paramount duty, they were bound to use ordinary care and diligence so as not unnecessarily to injure the property of others." See, also, Kerwhacker v. Railroad Co., 3 Ohio St. 172; Railroad Co. v. Lawrence, 13 Ohio St. 69; Railroad Co. v. Terry, 8 Ohio St. 581.

On the contrary, it has been held in Wisconsin, in Bennett v. Railway Co., 19 Wis. 158: "When the plaintiff's colt was trespassing on the railroad track, the company is not liable for injuring it, unless the injury was inflicted wilfully or from gross negligence by the company's servants." See, also, Stricke v. Railroad Co., 9 Wis. 202.

In Railroad Co. v. Skinner, 19 Pa. St. 51, the case itself was one in which probably the court properly held, that the railroad company was guilty of no negligence; but the syllabus of the case, adopting very strong language, used by Gibson, J., is "that an owner of cattle suffered to go at large, and which are killed or injured on a railway, has no recourse to the company or its servants."

In Jackson v. Railroad Co., 25 Vt. 150, it was decided "that a railway company will be liable for either recklessness or want of common care at the time and after cattle are discovered by them on their track, or for wanton injury." In that state railroad companies are required to maintain fences along their roads.

In Trout v. Railroad Co., 23 Grat, 619, the plaintiff's horses got out of his field on a railroad track, by some third person without his knowledge leaving the gate open, and they were killed by the company's engine. The engineer had ample time after seeing the horses to stop the engine before reaching the place where they were killed; but he did not slacken his speed, but merely blew his whistle to frighten them off the track. On a demurrer to evidence by the defendant, the court held that the railroad company was liable.

In this state it has been decided, that it is the duty of the servants of a railroad company, so far as is consistent with their other paramount duties, to use ordinary care to avoid injury to cattle on the track. They are bound to adopt the ordinary precaution to discover danger as well as to avoid its consequences after it is known. Baylor v. Railroad Co., 9 W. Va. 271. And in Blaine v. Railroad Co., 9 W. Va. 254, it was decided, that the remote negligence of the plaintiff will not

prevent his recovery for an injury to his property immediately caused by the negligence of the defendant. The negligence of the plaintiff, that defeats a recovery, must be the proximate cause of the injury; and that suffering cattle to run at large, by means whereof they stray on an uninclosed railroad-track, is not in general a proximate cause of the loss; and hence though there may have been some negligence in the owners permitting cattle to go at large, such negligence being only a remote cause of the loss, it will not prevent his recovering from the railroad company the value of the cattle, if the immediate cause of their death or injury was the negligence of the company's servants in conducting the train.

Though these authorities are to a considerable extent conflicting, yet the weight of authority and reason are decidedly in favor of the proposition that though by the negligence of the plaintiff his cattle are on a railroad-track uninclosed, yet the servants of the railroad company are bound to use ordinary precaution to discover that the cattle are on the track as well as to avoid injuring them when they are discovered to be on the track; and if they fail to do so the company is responsible. This responsibility they will not be relieved from by the fact, that under the circumstances which existed it was the duty of the owner of the cattle to have given to the train, which he saw approaching, a signal of the danger, and he failed to do so; nor by the fact, that the owner of the cattle saw the train approaching and could have driven his cattle off the track, but from negligence failed to do so. A party is only responsible for the natural consequences, which follow from his negligence, that is, such consequences as he might reasonably expect to follow from his negligence. The owner of the cattle, though he neither gave a signal to the approaching train nor drove his cattle off the track, could not reasonably expect, that, if they were seen in time by the engineer of the railroad train, and he could readily avoid injuring them, he would not do so. Therefore in the view of the law he is not responsible by reason of his neglect for the injnry of his cattle. He did not directly contribute to this result; and in the view of the law it was caused entirely by the negligence of the railroad company's engineer in not using the ordinary precaution to discover that the cattle were on the track and to avoid injuring them.

I have examined the various cases referred to by the counsel of the plaintiff in error; and I do not find that any of them are inconsistent with the views I have above expressed. Many of them have a very remote bearing on the questions involved in this case, some of them refer to the extent to which the plaintiff's negligence must contribute directly to the result in order to prevent his recovery, that is, whether it should be a substantial contribution to the result directly, or whether a slight contribution by the plaintiff directly to the result would bar him, when the defendant's negligence was gross. This point is not according to my view involved in this case, and I have therefore waived expressing any opinion upon it.

A nnmber of these cases sustain the view of Justice Swayne in delivering the opinion of the supreme court in Railroad Co. v. Jones, 95 U. S. 442, who says: "Where the plaintiff himself has so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened, he is not entitled to recover." As I understand Justice Swayne when he speaks of the plaintiff contributing to the misfortnne, to mean contributing directly and not remotely, there is nothing in that case or in any of the others, to which the counsel for the plaintiff in error refers, to indicate that any contribution of the plaintiff is referred to as barring him of his right of action except direct contribution to the result. In fact, as we have seen, remote contribution is not regarded by the law as any contribution. The law, as we have seen, does not regard the remote cause but treats it just as though it had no existence; and when Justice Swayne and others refer generally to the cause of a misfortune, they must be interpreted to refer to the direct or proximate cause and not to the remote cause. So understanding him, there is no inconsistency between the views he has expressed and those I have expressed. He seems not to have had in his mind or under consideration, whether the plaintiff's negligence was the proximate or remote cause of the injury, but rather the question, what degree of negligence on his part would bar his recovering?

Negligence is a mixed question of law and fact generally, and what particular facts constitute negligence is generally a question of fact for the determination of the jury from all the evidence before them bearing on the subject, rather than a question of law for the determination of the court. The most the court can do ordinarily, when there is a contrariety of testimony, and the question of care or negligence depends upon the consideration of a variety of circumstances, is to define the degree of care and caution required by law, and leave to the practical judgment and discretion of the jury the work of comparing the acts and conduct of the parties concerned, with the duties required of them under such circumstances. There may be some cases where the question of negligence may be properly one of law for the court; but such a case must present some prominent act not depending upon surrounding circumstances for its quality, and in regard to the effect and character of which no room is left for ordinary minds to differ. Negligence is, however, generally a relative term, very much dependent upon the particular facts and circumstances of each case that occurs; so that what may be ordinary or reasonable care in

one state of the case may be gross negligence in another.

It is not proper for the court to separate a few facts from their connection with others, and make them the basis of an instruction of this character. Such a course would tend to mislead the jury. While the court has the power to set aside the verdict of the jury and grant a new trial in a proper case, still it is not proper for the court to derogate from the proper province of the jury, as it would do if it should separate a particular fact from its connection with others on which it is dependent for its quality, and instruct the jury that such fact constitutes or does not constitute negligence. See Snyder v. Railroad Co., 11 W. Va. 34, 35; Railroad Co. v. Fitzpatrick, 32 Md. 32-44; Railroad Co. v. Boteler, 38 Md. 586; Merchants' Bank of Baltimore v. Bank of Commerce, 34 Md. 53.

Not only may that be negligence in one state of the case, which would not be in another, but what may be negligence in one country may not be negligence in another. The common law of England imposes on the owner of domestic animals the duty of keeping them on his own land; and he becomes a trespasser, if they stray upon the land of another uninclosed. But this common law rule is not in force in this state. In this state a railroad company cannot complain, that cattle stray on its uninclosed road. The owner of cattle so straying on an uninclosed road are not trespassers. See Blain v. Railroad Co., 9 W. Va. 252, and Baylor v. Railroad Co., 9 W. Va. 270.

These principles necessarily lead us to the conclusion, that a railroad company, whose road is uninclosed, has no right to presume that the owners of domestic animals will keep them at home and not suffer them to roam upon the track of their railway. The law of West Virginia does not impose such a duty on them.

All the authorities agree, that where damages were occasioned entirely by the negligence of the defendant, the plaintiff is entitled to recover; but the burden of proving this negligence is on him. If the plaintiff has contributed directly to the injury in the manner above fully explained, he cannot recover; but the burden of proof is on the defendant to establish such contributory negligence in this state. See Snyder v. Railroad Co., 11 W. Va. 30.

Before applying the principles of law we have stated to the case before us, we will dispose of a preliminary question raised by the demurrer to the declaration. The plaintiff in error in his assignment of errors and in his arguments points out no fatal defects in the declaration, and I perceive none. It seems to be substantially like the declaration in Blain v. Railroad Co., 9 W. Va. 252, and that declaration this court held to be good on demurrer.

We will now consider the various errors assigned by the plaintiff in error as occurring during the trial of the cause and apply to them the principles of law we have stated.

Instruction A asked by the defendant's counsel, instead of being modified by the court and then granted, ought to have been refused. It was improperly interfering with the province of the jury for the court to instruct them, that it was the duty of the defendant, if she could do so, to drive her horses from the railroad or to warn the defendant of the threatened danger by signal or otherwise, and if she failed in either respect, the plaintiff was guilty of contributory negligence and could not recover. Whether under all the circumstances it was or was not her duty to give a signal of the threatened danger, and whether it was negligence under the then existing circumstances to fail to do so, was a question of fact, with which the court ought not to have interfered. The necessity or propriety of the plaintiffs giving such signal obviously depended on the surrounding circumstances. If for instance the cattle had been in a position, that the engineer could not see them, and the plaintiff could see them, it might be his duty to give the approaching train a signal of this secret danger; and on the other hand if the plaintiff's servants were actively engaged in attempting to drive the cattle off the track, and they were in full view of the engineer, it would have been not only useless but improper for the plaintiff's servants to desist from driving the cattle off the track, to do, what might be under these circumstances an idle thing, that is, to give such a signal. The giving of any instruction therefore by the court on this point was an improper interference by it with the province of the jury on the principles we have laid down; and it was calculated to mislead the jury. If the jury had obviously based their verdict on the assumption, that the plaintiff was guilty of negligence under the circumstances in not giving such signal, and the circumstances had been such as obviously made it the duty of the plaintiff's servants to give such signal, the court could have set aside the verdict and have granted a new trial. Under the circumstances which existed as shown by the record the court could not properly have set aside the verdict, because the jury assumed, that it was not negligence in the plaintiff to fail to give such signal. Much less could the court properly give an instruction to the jury, which might lead the jury to infer, that it was the duty of the plaintiff to give such signals. But this error of the court did not prejudice the defendant and he could not in this court complain thereof.

It complains, however, of the modification of this instruction appended by the court which was in effect, that though the plaintiff had been guilty of negligence in not driving the horses off the track or in not giving a signal to the approaching train, yet the jury should find a verdict for her, if they

further found that after the cattle were discovered by the engineer to be upon the track, or ought to have been so discovered by the use of ordinary diligence, he failed to use ordinary precaution to avoid the danger. Though this modification is not very well worded, it substantially lays down the law, as we have stated it above, and the defendant could not complain of its being given.

The latter part of the defendant's instruction B, which is, "that when the horses were discovered on the railroad-track, the first and paramount duty of the engineer was to provide for the safety of passengers and property upon the train, and after that to avoid unnecessary injury to them, if it could be done by the exercise of ordinary and reasonable care" is good law; and in a proper case it ought to have been granted. But there was no evidence tending in the least to show, that the conduct of the engineer in this case was influenced or could possibly have been influenced by his desire first to provide for the safety of passengers and property, upon his train. And the court might for this reason have properly declined to give this part of the instruction. The legal proposition it states is good law, yet it was inapplicable to the evidence, which had been offered, and was a mere abstract legal proposition, which might, if given by the court, tend to mislead the jury. The first part of this instruction was still more objectionable, as it would, if given, have tended to mislead the jury. They could only draw from it the conclusion, that the railroad company would have a right to complain, that the plaintiff's horses were on their track, though their road ran through the meadow of the defendant and was uninclosed. Such is not the law, as we have seen, in this state. The court thereupon properly rejected the defendant's instruction marked "B."

The first part of defendant's instruction C, lays down an abstract proposition of law correctly, that is, "that a railroad company has the right to regulate the management and speed of their train solely with reference to the security of persons and property in their charge." But it is difficult to see any bearing this law could have on the facts of the case in evidence before the jury. The instruction then proceeds, "and they may make their plans upon the reasonable and legal presumption that the owners of domestic animals will keep them at home and not suffer them to stray upon the track." It is difficult to say what was meant by the words "they may make their plans." If this refers to the action of the superintendent of the road in making out his time-tables and providing for making connection with other roads, the proposition contained in the instruction is good law; but it is law which could have no possible connection with this case, could not possibly enlighten the jury as to their duties, and might perhaps mislead them, and it ought for this reason to have been refused by the court. If by saying "the company might make its plans upon the legal and reasonable presumption, that the owners of domestic animals would keep them at home and not suffer them to stray upon the track," the instruction meant, as I supposed it did, "that the company might run their trains on this legal presumption," then the instruction was obviously pertinent to the case and would have given the jury essential aid in the performance of their duty. But, unfortunately for the defendant, if this was the meaning of the instruction, it laid down a proposition which is not good law in this state. It is not a reasonable and legal presumption in this state, that the owners of cattle will keep them at home and not permit them to stray upon the track. The law does not require the plaintiff to keep her cattle at home, but permits her to let them run at large. The railroad ran through her meadow and was uninclosed. She had a right to pasture her horses on her meadow; and having this right, clearly the railroad company could not reasonably presume her horses would not stray upon the railroad-track. On the contrary they ought rather to presume that they would, and to run their trains with the care and caution which such presumption made necessary. The instruction, I suppose, meant to state the law otherwise; and if it did not, it is obvious that it was liable to be so understood by the jury; and the court therefore did not err in refusing to grant this instruction.

Instruction B was well calculated to mislead the jury; and instruction C would certainly have done so. They were both properly rejected.

All the evidence is not set forth; and of course this court cannot say, that the circuit court erred in refusing to grant a new trial. The evidence, that is set forth, seems to be such as renders it highly probable that the jury was justified in finding a verdict for the plaintiff. This court must presume, in the absence of anything showing that the verdict is wrong, that it was right.

The judgment of the circuit court, therefore, of March 28, 1878, must be affirmed; and the defendant in error must recover of the plaintiff in error her costs in this court expended and damages according to law.

The other judges concurred.

Judgment affirmed.

See the contrary view, as to the duty of the company to avoid a collision, defended in Illinois Central R. R. Co. v. Noble, 142 Ill. 578, 32 N. E. 684.

Fire spreading over intervening peat bog. Statute. Duty of company to extinguish fire. Interference of third party.

SIMMONDS v. NEW YORK & NEW ENGLAND R. R. CO.

(52 Conn. 264.)

Supreme Court of Errors of Connecticut. Oct. Term, 1884.

Action to recover damages caused by fire communicated from defendant's locomotive. There was a judgment for plaintiff. Defendant appealed. Affirmed.

E. D. Robbins, for appellant. J. P. Andrews, for appellee.

LOOMIS, J. A fire was communicated by a locomotive engine of the defendant to land of one Davis adjacent to the defendant's railroad track. The fire by its own action and by the operation of natural causes spread and passed across the land of Davis to the land of the plaintiff, where the injury set forth in the complaint was done.

While the fire was burning on the land of Davis the track foreman of the defendant, with men under him, commenced to extinguish it, which could easily have been accomplished. While the track foreman and his men were so engaged, Davis came and said he preferred that the bogs on his land should burn, if the fire was subdued elsewhere so that it could not spread. The fire then was extinguished elsewhere, and thereupon the track foreman and his men left, leaving some of the bogs burning.

The court finds that the servants of the defendant were not prevented by Davis from extinguishing the fire, but that they supposed, as Davis did, that no injury could result if the fire was left in the bogs. In this, however, they were disappointed, for the fire penetrated to the peat beneath the bogs, and so spread to the plaintiff's land, which adjoined the land of Davis on the east. These facts are made the basis of the recovery of damages of the defendant by virtue of the provisions of a statute enacted in 1881 (Laws 1881, c. 92), the first section of which is as follows: "Where any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf."

Aside from the effect of the interposition of Davis, which we will presently consider, it is obvious that the facts are ample to bring the case within the provisions of the statute. The right of the plaintiff to recover is not dependent at all upon any negligence on the part of the defendant as at common law nor is it material that the fire was not directly communicated to the plaintiff's land, but reached it through the intervening land of another.

In Perley v. Railroad Co., 98 Mass. 99, under a similar statute, the sparks from the locomotive engine first set fire to the grass in the open field near by, which spread over the premises of several different owners to the plaintiff's wood lot half a mile distant, where the injury was done for which the railroad company was held liable.

Such a construction of our statute the defendant does not seek to controvert, but relies solely on the principle that the intervention of the independent act of Davis between the act of the defendant complained of and the injury to the plaintiff, constitutes in law the proximate cause of the injury, and that therefore the act of the defendant is too remote.

This introduces us to a realm of law abounding in nice distinctions, which however need not be particularly discussed. The general principle which the defendant invokes is established by a strong array of authorities, but the facts as found by the court would seem to forbid its application to the present case.

In the first place, it is difficult to discover in the independent act of Davis a sufficient power to stand as the cause of the injury. It is not pretended that he contributed any new force or power whatever to modify the result of the original act. The argument is merely that he adopted the fire as his own, but in so doing he did nothing to increase or extend it, but simply let it alone, so that the original cause was allowed to work out its natural consequences Then too this adoption of the fire was a matter confined to Davis and the defendant, and was voluntarily assented to by the latter. How then could it relieve the defendant of a primary liability which the law imposes in favor of third persons? Could the defendant delegate its duty to another and thereby escape liability? If the servants of the defendant were obliged by law to leave the premises of Davis upon his suggestion before the fire was extinguished, it might well be contended that a new power had intervened which made the act of the defendant too remote. But nothing of this kind happened. The finding says that Davis did not prevent the extinguishment of the fire. Whether he could have done so rightfully we are not now called upon to determine.

In making the railroad corporations insurers against the consequences of fire communicated by their locomotive engines, the law implies in them the right and duty to put it out when communicated.

We know that under the general police

power of a state and by the law of overruling necessity private property during a fire may be destroyed to prevent the spreading of a conflagration. Whether this principle would allow a railroad corporation to enter upon land against the will of the owner to extinguish a small fire which under the circumstances did not at the time appear to be threatening to other property, may admit of some question, which we will not now attempt to solve. It will suffice for the purposes of this case that there was no prohibition at all. Assuming that the statute is valid it makes railroad corporations insurers of all the property along the road liable to be burned by the running of locomotive engines. As soon as a fire is thus kindled the duty arises to prevent its spreading to other adjoining lands. The obligation is very different from that of the landowner at common law who is liable only for the consequences of his negligence as to the fire which he kindles on his own land.

The railroad corporation is bound at all hazards to prevent the fire from spreading, and is liable inevitably unless there is contributory negligence on the part of the landowner. Now the duty which the defendant owed the plaintiff could not be excused by an arrangement made with a third person without the plaintiff's consent. One may part with his rights, but can never cancel his duties without the consent of those to whom they are due.

For these reasons we think the intervention of Davis was not sufficient to break the connection between the act of the defendant complained of and the resulting injury to the plaintiff for which this suit is brought.

There was no error in the judgment complained of. In this opinion the other judges concurred.

Fire insurance a contract of indemnity. Subrogation. Compromise and release by party injured, saving his rights against his insurer.

CONNECTICUT FIRE INSURANCE CO. v. ERIE RAILWAY CO.

(73 N. Y. 399.)

Court of Appeals of New York. April 23, 1878.

Action by an insurance company against a railway company to recover the amount paid by plaintiff to a third person under a policy of insurance, on the ground that the loss was caused by defendant's negligence. A verdict for plaintiff was set aside, and the complaint dismissed. Plaintiff appealed. Reversed.

M. H. Hirschberg, for appellant. Lewis E. Carr, for respondent.

CHURCH, C. J. It must be assumed from the verdict of the jury that the buildings were burned through the negligence of the defendant's agents and servants, and it is too well settled to render the citation of authorities necessary, that as between the plaintiff, the insurer, and the defendant, the latter was ultimately liable for the loss. A fire policy is a contract of indemnity, and if a loss is occasioned by the wrongful act of another the insurer is subrogated to the rights and remedies of the assured, and may maintain an action against the wrong-doer. If the assured receives the damages from the wrong-doer before payment by the insurer, the amount so received will be applied pro tanto in discharge of the policy. Hart v. Railroad Corp., 13 Metc. (Mass.) 99. If the wrong-doer pays the assured after payment by the insurer, with knowledge of the facts, it is regarded as a fraud upon the insurer, and he will not be protected from liability to the latter. Clark v. Wilson, 103 Mass. 223; Insurance Co. v. Hutchinson, 21 N. J. Eq. 107; Graff v. Kip, 1 Edw. Ch. 619.

The question is presented in this case in a somewhat novel aspect, and unlike that of any other case to which our attention has been called. The plaintiff paid the policy after the release by the assured to the defendant, and by consenting to the judgment the payment must be regarded as voluntary on its part. If the plaintiff might have interposed the payment by the defendant to the assured, and the release as a defense to an action by the latter upon the policy, then the plaintiff cannot maintain this action. This question and the liability of the defendant depend upon the construction to be put upon the release, or rather if that construction be in favor of the plaintiff it will be unnecessary to notice any other point. The release is as follows:

"Loss and Damage.

"Erie Railway Company, to John Martin, Salisbury Mills, Dr.

"For settlement in full of all claims, demands and causes of action against the Erie Railway Company for loss and damage by fire, claimed to have been caused by sparks or coals from engine, burning hotel building, barn, shed and contents, fences, trees, etc, at Salisbury station, on or about May 13, 1873, $2,100.

"This settlement is not intended to discharge the Connecticut Fire Insurance Company from any claim which said Martin has against them for insurance, but as a full settlement with, and discharge of, the Erie Railway Company only.

"Received, September 10, 1873, of the Erie Railway Company, through the hands of R. L. Brundage, claim agent, two thousand one hundred dollars, in full of the above amount.

"$2,100. John Martin."

It is proper to refer to the surrounding circumstances. The buildings burned were worth about $3,400. Of the consideration paid for the release $300 was paid for a parcel of land conveyed to the defendant, leaving $1,800 paid for the damage to the buildings. The clause that the settlement was not intended to discharge the plaintiff from any claim of the assured against it for insurance was in the nature of a proviso or exception from the general purview of the release. It must be construed so as to carry out the intent of the parties, and that intent must be determined from the language viewed in the light of surrounding circumstances. It is evident that the assured did not receive the full amount of the damages incurred. This circumstance sheds some light upon the meaning of the release. The clause was intended for some purpose, and it seems to me obvious that it was designed to prevent the plaintiff from interposing the release as a defense to an action on the policy, and it is inferable that the amount of the policy was deducted from the amount of the loss in the settlement with the defendant. The substance of the transaction was that the assured, having a claim against the plaintiff for $1,500, settled with and released the defendant from liability for the balance, retaining the claim against the plaintiff. The form of the clause is not very specific, but looking at the substance it was a proviso that the release should not operate to prevent a recovery upon the policy against the plaintiff. With such a proviso, other portions of the release would have to yield to enable the proviso to have effect, and as to the plaintiff it would be the same as though no release had been given. It follows that the plaintiff could not have interposed the release as a defense in an action by the assured upon the policy, and if not, the logical sequence is that the right of subrogation inures against the defendant.

It is insisted that as the assured has settled and released all his claim for damages, the plaintiff could acquire no right or remedy through him by equitable subrogation, or from him by assignment. This proposition implies an assumption of the controverted fact whether the assured did release all claim.

The answer to it is that the assured released only such damages as he could without interfering with his claim against the plaintiff, and the legal consequences must be regarded as a part of the exception, viz., the right of the plaintiff to a remedy over. This was as much reserved as the right to enforce the policy. That right could not be reserved without reserving the remedy. The power to enforce the policy having been expressly reserved, the parties could not take away the right of the plaintiff to the remedy which that reservation vested in him by law. Having made their agreement so as to prevent the plaintiff from interposing this defense, they cannot object to the consequences which legally flow from it. The exception necessarily embraces the right of subrogation. It is not needful to consider whether the effect would have been different if the assured had received the full amount of the loss. No injustice is done the defendant by the result indicated. It was liable for the whole loss, and the payment to the plaintiff of the amount of the policy will, with that already paid, not exceed that amount. It did not profess to pay the assured but a part of that amount, nor did the assured intend to receive but a part, and the legal construction of the contract accords with the principles of right and justice. The action is properly brought in the name of the plaintiff. No other person has any right or interest in the claim. Code, § 111; Cummings v. Morris, 25 N. Y. 627.

The judgment must be reversed and judgment ordered on verdict.

All concur, except MILLER, J., absent.

Judgment accordingly.

Suit against State officer as such. Const. U. S., Amend. 11. Wrongful execution of valid statute. Jurisdiction given to United States courts by State law. Right to tolls. Railroad commissioners. Injunction. Unreasonably low rates prescribed. Const. U. S., Amend. 14. Classification of freight. No profits earned. Rights of investors in railroads. Wasteful management. Partial reversal of judgment.

REAGAN v. FARMERS' LOAN & TRUST CO. et al.

(154 U. S. 362, 14 Sup. Ct. 1047.)

Supreme Court of the United States. May 26, 1894.

No. 928.

Appeal from the circuit court of the United States for the western district of Texas.

This was a suit by the Farmers' Loan & Trust Company against John H. Reagan, W. P. McLean, L. L. Foster (railroad commissioners of the state of Texas), C. A. Culberson (attorney general of the state), the International & Great Northern Railroad Company, and Thomas N. Campbell (receiver of that company), brought to restrain said railroad commissioners from enforcing certain rates and regulations prescribed by them for said company, and to restrain the attorney general from suing for penalties for failure to conform to such rates and obey such regulations. The railroad company filed an answer and a cross bill similar to complainant's bill, and praying substantially the same relief. The railroad commissioners and the attorney general filed answers, but afterwards withdrew their answers, and filed demurrers. Their demurrers were overruled, and a decree for defendants was rendered, making a temporary injunction previously granted (51 Fed. 529) perpetual. The railroad commissioners and the attorney general appealed.

On April 3, 1891, the legislature of the state of Texas passed an act to establish a railroad commission. The first section provides for the appointment and qualification of three persons to constitute the commission; the second, for the organization of the commission; while the third defines the powers and duties of the commission, and is as follows:

"Sec. 3. The power and authority is hereby vested in the railroad commission of Texas and it is hereby made its duty, to adopt all necessary rates, charges, and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this act prescribed through proper courts having jurisdiction.

"(a) The said commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this state into such general and special classes or subdivisions as may be found necessary and expedient.

"(b) The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this act for the transportation of each of said classes and subdivisions.

"(c) The classifications herein provided for shall apply to and be the same for all railroads subject to the provisions of this act.

"(d) The said commission may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed for railroads.

"(e) The said commission shall have power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this state reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more lines of such railroads.

"(f) If any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, the commission shall fix the pro rata part of such charges to be received by each of said connecting lines.

"(g) Until the commission shall make the classifications and schedules of rates as herein provided for, and afterwards if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject hereto, and fix the rates to be charged by such roads therefor; and such classifications and rates shall be put into effect in the manner provided for general classifications and schedules of rates.

"(h) The commission shall have power, and it shall be its duty from time to time, to alter, change, amend, or abolish any classification or rate established by it when deemed necessary; and such amended, altered, or new classifications or rates shall be put into effect in the same manner as the originals.

"(i) The commission may adopt and enforce such rules, regulations, and modes of procedure as it may deem proper to hear and determine complaints that may be made against the classifications or the rates, the rules, regulations, and determinations of the commission.

"(j) The commission shall make reasonable and just rates of charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road; and may establish for each railroad or for all railroads alike reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty-eight hours' notice to the consignee, not to include Sundays.

"(k) The commission shall make and establish reasonable rates for the transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The commission shall have power to prescribe reasonable rates, tolls, or charges for all other services performed by any railroad subject hereto."

The first paragraph of the fourth section is in these words:

"Sec. 4. Before any rates shall be established under this act, the commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases."

The remaining paragraphs give power to adopt rules of procedure. The fifth, sixth, and seventh sections are as follows:

"Sec. 5. In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations, and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair, and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 hereof.

"Sec. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act, or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: provided, that if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice.

"Sec. 7. In all trials under the foregoing section the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them."

Sections 8–13 contain special provisions which are not material to the consideration of any question presented in this case.

Section 14 reads:

"Sec. 14. If any railroad company subject to this act, or its agent or officer, shall hereafter charge, collect, demand or receive from any person, company, firm or corporation a greater rate, charge, or compensation than that fixed and established by the railroad commission for the transportation of freight, passengers, or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling, or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the state of Texas a sum not less than $100 nor more than $5,000."

Section 15 defines "unjust discrimination," and imposes a penalty of not less than $500, nor more than $5,000, upon any railroad company violating any provision of the section.

Section 16 is leveled against officers and agents of railroads, and imposes a penalty of not less than $100, nor more than $1,000, for certain offenses denounced therein.

Section 17 declares that any railroad company violating the provisions of the act shall be liable to the persons injured thereby for the damages sustained in consequence of such violation, and in case it is guilty of extortion or discrimination, as defined in the act, shall pay, in addition to such damages, to the person injured, a penalty of not less than $125, nor more than $500.

In sections 18 and 19 are further provisions as to penalties. The remaining sections—20 to 24, inclusive—contain matter of detail, which is unimportant in this case.

Three of the plaintiffs in error, Reagan, McLean, and Foster, were duly appointed and qualified as members of said railroad commission, and organized it on the 10th day of June, 1891. The other plaintiff in error, Culberson, is the attorney general of the state, who, by section 19 of the act, was charged with the duty of instituting suits in the name of the state for the recovery of all the penalties prescribed by the act, excepting those recoverable by individuals under the authority of section 17.

After the commission had organized, on June 10th, it proceeded to establish certain rates for the transportation of goods over the railroads in the state, and also certain regulations for the management of such transportation. Thereafter, on April 30, 1892, the Farmers' Loan & Trust Company filed its bill in the circuit court of the United States for the western district of Texas, making as defendants the railroad commissioners, the attorney general, the International & Great Northern Railroad Company, and Thomas M. Campbell, the receiver thereof, duly appointed by the district court of Smith

county, Tex. That bill, which is too long to be copied in full, alleged that the plaintiff was the trustee in a trust deed executed by the railroad company on the 15th day of June, 1881, to secure a second series of bonds, aggregating $7,054,000, bearing interest at the rate of 6 per cent. per annum, and that there was a prior issue of bonds, to the amount of $7,954,000, secured by a conveyance to John S. Kennedy and Samuel Sloan, as trustees. It then set forth the railroad commission act, heretofore referred to, or so much thereof as was deemed material, the proceedings of the commission, and the notices that were given to the railroad company, and attached as exhibits the several orders prescribing rates and regulations. It also averred generally that such rates were unreasonable and unjust, set forth certain specific facts which it claimed established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing those rates, or any other rates, and also restraining the attorney general from instituting any suits to recover penalties for failing to conform to such rates and obey such regulations. The International & Great Northern Railroad Company appeared, filed an answer, and also a cross bill similar in its scope and effect to the bill filed by the plaintiff, and praying substantially the same relief. The railroad commission and the attorney general at first filed answers, but, after a certain amount of testimony had been taken (of the nature and extent of which we are not advised, inasmuch as it is not preserved in the record), they withdrew their answers, and filed demurrers, leave being given at the same time to the complainant and cross complainant to amend the bill and cross bill before the filing of the demurrer. The amendments to the bill and cross bill were similar, and contained allegations more in detail of the losses in revenue sustained by the company through the enforcement of the tariffs, and the average reduction caused by such tariffs in the rate theretofore existing, and also setting forth certain contract rights under an act of the legislature of the state of Texas passed on Febuary 7, 1853. Thereafter the cause was submitted to the court on the bills and cross bills and demurrers, and on March 23, 1893, a decree was entered in favor of the plaintiff, as follows:

"This cause having been set down for final hearing on the pleadings and evidence, and being called for hearing thereon, the defendants John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson presented their motion, on file herein, for leave to withdraw their answers and file demurrers, which motion was granted, conditioned upon the said defendants paying all costs of taking depositions and evidence, herein against them to be taxed, and for which execution may issue, and on condition that the complainant and cross complainant have leave to amend before the filing of the demurrers of the said defendants, which leave was granted; and whereupon said amendments were filed, and the demurrers of the said defendants were filed to the original bill of complaint and cross bill in this cause, as also to all amendments thereto, and were by complainant and cross complainant set down for argument, by consent, and were by all parties forthwith submitted. And thereupon, in consideration thereof, it was ordered, adjudged, and decreed that said demurrers be, and the same are hereby, overruled. And the defendants John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson having entered of record their refusal to make further answer, and the fact that they stood upon their demurrers, and all parties submitting the cause for final decree, it is now, upon consideration thereof, ordered, adjudged, and decreed that the bill of complaint, as amended, and the cross bill of complaint, as amended, in the above-entitled cause, be, and the same are hereby, sustained, and taken for confessed. And the said cause coming on further to be heard upon the bill of complaint herein, as amended, and upon the answer of the defendant railroad company thereto, confessing the same, it is further ordered, adjudged, and decreed as follows, to wit:

"First. That the injunctions heretofore issued in this cause be, and the same are hereby, made perpetual, and accordingly.

"Second. That defendant, the International & Great Northern Railroad Company be, and it is hereby, perpetually enjoined, restrained, and prohibited from putting or continuing in effect the rates, tariffs, circulars, or orders of the railroad commission of Texas, or either or any of them, as described in the bill of complaint herein, and in Exhibit C, thereto and therewith filed, and from charging, or continuing to charge, the rates specified in said tariffs, circulars, or orders, or either or any of them.

"Third. It is further ordered, adjudged, and decreed that the defendants the railroad commission of Texas and the defendants John H. Reagan, William P. McLean, and L. L. Foster, acting as the railroad commission of Texas, and their successors in office, and the defendant Charles A. Culberson, acting as attorney general of the state of Texas, and his successors in office, be, and they are hereby, perpetually enjoined, restrained, and prohiblted from instituting or authorizing or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act of the legislature of the state of Texas approved April 3, 1891, and fully described in the bill of complaint, or under or by virtue of any of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under or by virtue of the said act and the said tariffs, orders, or circulars of said railroad commission, or any or either of them combined; and said defend-

ants Reagan, McLean, and Foster, and the railroad commission of Texas, are further perpetually restrained from certifying any copy or copies of any of said orders, tariffs, or circulars, or from delivering, or causing or permitting to be delivered, certified copies of any of said orders, tariffs, or circulars to the said Culberson, or any other party, and from furnishing the said Culberson, or any other party, any information, of any character, for the purpose of inducing, enabling, or aiding him, or any other party, to institute or prosecute any suit or suits against the said defendant railroad company for the recovery of any penalty or penalties under the said act.

"Fourth. It is further ordered, adjudged, and decreed that the said railroad commission of Texas and the said Reagan, McLean, and Foster be perpetually enjoined, restrained, and prohibited from making, issuing, or delivering to the said railroad company, or causing to be made, issued, or delivered to it, any further tariff or tariffs, circular or circulars, order or orders.

"Fifth. It is further ordered, adjudged, and decreed that all other individuals, persons, or corporations be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or prosecuting any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty, or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under and by virtue of the said act and the said tariffs, orders, and circulars, or any or either of them combined.

"Sixth. It is further ordered, adjudged, and decreed that all rates, tariffs, circulars, and orders heretofore made and issued by said commission, and fully described in Exhibit C to the bill of complaint herein, be, and they are hereby, declared to be unreasonable, unfair, and unjust as to complainant and cross complainant, and they are hereby canceled, and declared to be null, void, and of no effect.

"Seventh. It is further ordered, adjudged, and decreed that all costs herein be taxed against said defendants Reagan, McLean, Culberson, and Foster, and the railroad commission of Texas, and that execution may issue therefor."

From that decree the railroad commission and the attorney general have appealed to this court.

C. A. Culberson, Atty. Gen., Henry C. Coke, and W. S. Simkins, for appellants. John F. Dillon, E. B. Kruttschnitt, Henry B. Turner, John J. McCook, Winslow S. Pierce, Geo. R. Peck, and J. W. Terry, for appellees.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The questions in this case are of great importance, and have been most ably and satisfactorily discussed by counsel for the respective parties.

We are met at the threshold with an objection that this is, in effect, a suit against the state of Texas, brought by a citizen of another state, and therefore, under the eleventh amendment to the constitution, beyond the jurisdiction of the federal court. The question as to when an action against officers of a state is to be treated as an action against the state has been, of late, several times carefully considered by this court, especially in the cases of In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, by Mr. Justice Matthews, and Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, by Mr. Justice Lamar. In the former of these cases it was said (page 505, 123 U. S., and page 164, 8 Sup. Ct.):

"To secure the manifest purposes of the constitutional exemption guarantied by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit, it must be held to cover, not only suits brought against a state by name, but those, also, against its officers, agents, and representatives, where the state, though not named as such, is nevertheless the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates."

And in the latter (page 9, 140 U. S., and page 699, 11 Sup. Ct.):

"It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.

"In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128; Antoni v.

Greenhow, 107 U. S. 769, 2 Sup. Ct. 91; Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. 292, 609; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state. Osborn v. Bank, 9 Wheat. 738; Davis v. Gray, 16 Wall. 203; Tomlinson v. Branch, 15 Wall. 460; Litchfield v. Webster Co., 101 U. S. 773; Allen v. Railroad Co., 114 U. S. 311, 5 Sup. Ct. 925, 962; Board v. McComb, 92 U. S. 531; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962."

Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates, is the state, and also because the statute under which the defendants acted, and proposed to act, is constitutional, and that the action of the state officers under a constitutional statute is not subject to challenge in the federal court. We are unable to yield our assent to this argument. So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has, in a pecuniary sense, no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers; and the only direct pecuniary interest which the state can have arises when it abandons its governmental character, and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers, staying the collection of taxes; and yet a frequent and unquestioned exercise of jurisdiction of courts, state and federal, is in restraining the collection of taxes, illegal in whole or in part.

Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge; and yet the officers charged with the administration of that valid tax law may so act under it, in the matter of assessment or collection, as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. In Cunningham v. Railroad Co., 109 U. S. 446, 452, 3 Sup. Ct. 292, 609, it was said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him. See Mitchell v. Harmony, 13 How. 115; Bates v. Clark, 95 U. S. 204; Meigs v. McClung, 9 Cranch, 11; Wilcox v. Jackson, 13 Pet. 498; Brown v. Huger, 21 How. 305; Grisar v. McDowell, 6 Wall. 364."

Nor can it be said, in such a case, that relief is obtainable only in the courts of the state; for it may be laid down, as a general proposition, that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. Cowles v. Mercer Co., 7 Wall. 118; Lincoln Co. v. Luning, 133 U. S. 529, 10 Sup. Ct. 363; Chicot Co. v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695.

We need not, however, rest on the general powers of a federal court in this respect; for, in the act before us, express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 6 provides that any dissatisfied "railroad company, or

other party at interest, may file a petition" "in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant." The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis county, but in Travis county. The language, differing from that which ordinarily would be used to describe a court of the state, was selected, apparently, in order to avoid the objection of an attempt to prevent the jurisdiction of the federal courts. The circuit court for the western district of Texas is "a court of competent jurisdiction in Travis county." Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. 35. It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit. Were this, in terms, a suit against the state, if by express statute the state had waived its exemption, and consented that suit might be brought against it, by name, in any court of competent jurisdiction in Travis county, it might well be argued that thereby it consented to a suit brought by a citizen of another state in the circuit court of the United States for the western district of Texas, sitting in Travis county, on the ground that the limitations of the eleventh amendment to the federal constitution simply create a personal privilege, which can at any time be waived by the state. However, it is unnecessary to go so far as that, for this cannot, for the reasons heretofore indicated, in any fair sense, be considered a suit against the state.

Still another matter is worthy of note in this direction. In the famous Dartmouth College Case, 4 Wheat. 518, it was held that the charter of a corporation is a contract protected by that clause of the national constitution, which prohibits a state from passing any law impairing the obligation of contracts. The International & Great Northern Railroad Company is a corporation created by the state of Texas. The charter which created it is a contract whose obligations neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and, on the other hand, one obligation assumed by the state was that it would not prevent the company from so constructing and operating the road. If the charter had, in terms, granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the state, which it could not repudiate. Whether, in the absence of an express stipulation of that character, there is not implied, in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road, and return some profit to those who have invested their money in the construction, is a question not as yet determined. It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation (a citizen of the state) has the right to maintain a suit for the determination of that question, clearly a citizen of another state, who has, under authority of the laws of the state of Texas, become pecuniarily interested in—equitably, indeed, the beneficial owner of the property of—the corporation, may invoke the judgment of the federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the state in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the circuit court is not tenable; and this whether we rest upon the provisions of the statute, or upon the general jurisdiction of the court existing by virtue of the statutes of congress, under the sanction of the constitution of the United States.

Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state, as expressed by its legislation. Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334. No valid objection, therefore, can be made on account of the general features of this act,—those by which the state has created the railroad commission, and intrusted it with the duty of prescribing rates of fares and freights, as well as other regulations for the management of the railroads of the state.

Specific objections are made to the act on the ground that, by section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that, by section 14, excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act; and thus, as claimed, there is not only a limitation, but a practical denial, to railroad companies, of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until, in a direct proceeding, there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, cannot be reached for a length of time; that meanwhile a failure to obey those

regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if, in a direct proceeding, the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly changed, and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot, and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the commission.

It is enough to say, in respect to these matters,—at least, so far as this case is concerned,—that it is not to be supposed that the legislature of any state, or a commission appointed under the authority of any state, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals, and also that no legislation of a state, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the federal courts, sitting as courts of equity; so that if, in any case, there should be any mistaken action on the part of a state, or its commission, injurious to the rights of a railroad corporation, any citizen of another state, interested directly therein, can find in the federal court all the relief which a court of equity is justified in giving. We do not deem it necessary to pass upon these specific objections, because the fourteenth section, or any other section prescribing penalties, may be dropped from the statute without affecting the validity of the remaining portions, and, if the rates established by the commission are not conclusive, they are at least prima facie evidence of what is reasonable and just. For the purpose of this case, it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged,—that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out, if that which is left is fully operative as a law, unless it is evident, from a consideration of all the sections, that the legislature would not have enacted that which is within, independently of that beyond, its power. Applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads, and to regulate rates, was the prime object of the legislation. This is fully accomplished, whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive, or simply prima facie, evidence of what is just and reasonable. The matters of penalty, and the effect, as evidence, of the rates, are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the commission, and given it power over railroads, without these independent matters. In other words, it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties, and the provision as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment. Take a similar body of legislation,—a tax law. There may be incorporated into such a law a provision giving conclusive effect to tax deeds, and also a provision as to the penalties incurred by nonpayment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the state depended for its validity upon the penalties for nonpayment of taxes, or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that these two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration.

It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter; insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government, and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial, function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate, and also, in a reverse case, to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature, instead of the carrier, prescribes the rates.

The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. In Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, and Peik v. Railway Co., Id. 164, the question of legislative control over railroads was presented; and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Mr. Justice Miller in Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 569, 7 Sup. Ct. 4, in respect to those cases:

"The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges."

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in Railroad Commission Cases, 116 U. S. 307, 331, 6 Sup. Ct. 334, 348; and, while the right of control was reaffirmed, a limitation on that right was plainly intimated in the following words of the chief justice:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of Dow v. Beidelman, 125 U. S. 680, 689, 8 Sup. Ct. 1028. Again, in Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 458, 10 Sup. Ct. 462, 702, it was said by Mr. Justice Blatchford, speaking for the majority of the court:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 344, 12 Sup. Ct. 400, is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business—that of elevating grain—was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us the records do not show that the charges fixed by the statute are unreasonable." Hence, there was no occasion for saying anything as to the power or duty of the courts in case the rates, as established, had been found to be unreasonable. It was enough that, upon examination, it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground.

These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was therefore within the competency of the circuit court of the United States for the western district of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was, in so doing, only exercising a power expressly named in the act creating the commission.

A classification was made by the commission, and different rates established for dif-

ferent kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility of handling, etc. It is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule, or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation. If a law be adjudged invalid, the court may not, in the decree, attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

We pass then to the remaining question, Were the rates, as prescribed by the commission, unjust and unreasonable? The bill, it will be remembered, was filed by a second mortgagee. The railroad company was made a defendant, and filed a cross bill. Each of these bills contains a general averment that the rates are unjust and unreasonable. That in the original bill, which was filed April 30, 1892, or some six or seven months after the action of the commission, is in these words:

"Eighth. That the classifications and schedules of rates and charges so announced and promulgated in and by said commodity tariffs and circulars of said commission, or sought so to be, as hereinbefore shown, are unfair, unjust, and unreasonable, and that the same cannot be adopted or put or continued in effect by the defendant company or defendant receiver without serious and irreparable loss to it, and serious and irreparable injury to, and destruction of, the property, rights, and interests of your orator and the beneficiaries of its trust, as hereinafter more fully set forth; that the rates so charged and announced by said commission are not compensatory, and are unreasonably low, and that the adoption and enforcement thereof would result, as nearly as can be estimated, in a diminution of reveuues derived from the operation of said International & Great Northern Railroad, aggregating more than $200,000 per annum; and that the revenues from said railroad, so reduced and diminished, would be inadequate and insufficient to provide for the payment of the interest upon the prior obligations of the defendant railroad company, recited in paragraph 4 hereof, and the interest upon the second mortgage bonds secured by said mortgage to your orator as trustee, after providing for the expenses of operating said lines of railroad and property, and maintaining the same in proper order and good working condition, so that the traffic and business of said road, and of every part thereof, shall at all times be conducted with safety to person and property, and with due expedition."

It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character and effect of the rates. Yet it is not to be ignored. There are often, in pleadings, general allegations of mixed law and fact, such as of the ownership of property and the like, which, standing alone, are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled, by particular facts stated therein. It would not, of course, be tolerable for a court administering equity to seize upon a technicality for the purpose, or with the result, of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commision are unjust and unreasonable. Yet it must be noticed that at first answers were filed, tendering issue upon the matters of fact, and testimony was taken, the extent of which, however, is not disclosed by the record. After that the defendants applied for leave to withdraw their answers, and file demurrers. It is not to be supposed that this was done thoughtlessly. But one conclusion can be drawn from that action, and that is that, upon the taking of their testimony, defendants became satisfied that the particular facts were as stated in the bills, and that the conclusions to be drawn from such facts could not be overthrown by any other matters. Hence, if it appears that the facts stated in detail tend to prove that the rates are unreasonable and unjust, we must assume, as against the demurrers, that the general allegation heretofore quoted is true, and that there are no other and different facts, which, if proved, might induce a different conclusion, and compel a different result.

What, then, are the special facts disclosed in the several bills? It appears that there is a bonded indebtedness of over $15,000,000, and, in addition, capital stock to the amount of $9,755,000; that the bonds and stock were issued for, and represent, value; and that the rates theretofore existing on the road were not sufficient to enable the company to pay all the interest on the bonds. At the time suit was commenced the first mortgage bonds outstanding amounted to $7,054,000, drawing 6 per cent. interest; the second mortgage bonds, to $7,954,000, drawing also 6 per cent. interest. The stockholders had never received any dividends whatever upon

their investment, but, on the contrary (as appears from the cross bill filed subsequently to the commencement of the suit), they had been forced to pay a cash assessment of over a million of dollars, or about 12 per cent. of the face value of the stock, for the purpose of providing in part for the interest upon the first mortgage bonds. The holders of those bonds had been compelled to accept, and had accepted, in payment of one-half of the accrued and defaulted interest,—a sum exceeding $750,000,—deferred certificates of indebtedness bearing interest at the rate of 5 per cent. The holders of the second mortgage bonds had been called upon to fund, and substantially all had consented to fund, past-due interest, amounting to upwards of $1,250,000, in third mortgage bonds, bearing 4 per cent. interest; and they had also been required to reduce, and substantially all had agreed to reduce, the interest on their bonds to 4½ per cent. per annum for the period of six years, and thereafter to 5 per cent. per annum. For about three years the road had been in the hands of a receiver appointed on account of the default of the company in the payment of its obligations. A statement in detail was incorporated in the bill, of the earnings and operating expenses of the road during the years 1889 and 1890, and the first nine months of 1891, which was supplemented by a like statement in the cross bill subsequently filed of the earnings and expenses for the entire year 1891 and the first three months of 1892. These statements show the following figures:

1889: Earnings	$3,488,185 14
Operating expenses, exclusive of taxes	2,629,452 90
Surplus	858,732 24
1890: Earnings	3,646,422 33
Operating expenses, exclusive of taxes	3,148,245 09
Surplus	498,177 24
1891: Earnings	3,648,641 79
Operating expenses, exclusive of taxes	3,093,550 20
Surplus	555,091 59
Three months of 1892:	
Earnings	759,176 18
Operating expenses, exclusive of taxes	829,074 87
Deficit	69,898 69

The bill also contains a tabular statement of the revenue per ton per mile derived from the operation of the road during the years 1883 to 1893, inclusive, as follows:

Revenue per ton per mile for 1883 (in cents)	2.03
" " " 1884	1.90
" " " 1885	1.71
" " " 1886	1.65
" " " 1887	1.38
" " " 1888	1.33
" " " 1889	1.44
" " " 1890	1.38
" " " 1891 (first nine months)	1.30

The mileage owned and operated by the company within the state of Texas amounts to 825 miles. There had been necessarily expended, in cash, in the construction and equipment of its road, more than $50,000 per mile, and it could not be replaced for less than $30,000 per mile. There is also this allegation in the cross bill:

"That the lines of railway of your orator's company have at all times been operated as economically as practicable, and that its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and that it has not been possible for your orator to operate said road for less than it has been operated; that for the year ending June 30, 1892, there were employed by your orator's company seventeen general officers, who received during said year an average daily compensation of $12.64, and, exclusive of its general officers, all of its employes, during and for the year ending June 30, 1892, received an average daily compensation of $2.01, and that at all times your orator has secured the service of its officers and employes as cheaply as practicable, and has employed no more than necessary, and that the above were fair and reasonable rates of pay; that at all times the International & Great Northern Railroad Company has secured all supplies, material, and property, of whatever character, for the operation of its road, at the cheapest market price, and at as low rates as the same could be secured, and has secured and used no more than actually necessary in the operation of the road."

In the amendment to the cross bill, filed in March, 1893, is given a table showing the actual reductions in amounts received by the railroad company for the transportation of the different classes of goods under the operation of the new tariffs up to August 31, 1892, and amounting to $159,694.51, and also a table showing the per cent. of reductions as to different articles, varying from 5 per cent., on cement, to 54.90 per cent., on grain in car loads. The bill also, in general terms, negatives the probability of any increase in amount of business to compensate for the reduction in rates, a negation sustained by the figures given in the amended bill as to the actual effect upon the receipts. It also contains a general averment that the rates on interstate business would be injuriously affected to an equal amount by reason of the reduction of rates on business within the state.

As against these facts the attorney general presses these matters: In the table in the bill heretofore referred to, showing earnings and expenses during the years 1889 and 1890, and the first nine months of 1891, there is this item, several times repeated, "Balance of income account;" and this on September 30, 1891, is stated at $3,795,785.68. Of what this account is composed, we are not informed. Possibly, there was included within it the proceeds of the land grant, which, as we are told, was made by the state to the corporation. But, whatever it includes, it was on January 1, 1889, as stated, $2,612,118.68, which would make the increase

of that account during the two years and nine months to be $1,183,667. Confessedly, no interest was paid during those years, and that amounted each year to something like $900,000, or nearly two millions and a half for the two years and nine months. It is obvious that, no matter what may have been in the bookkeeping of the company included in this account, or how much, or from what sources, in prior years, the road had accumulated this balance, the increase during the time stated did not equal the accruing interest. The attorney general also notices the report for the year ending June 30, 1892, made by the company to the railroad commission, a copy of which is attached as an exhibit to the amendment to the cross bill; and from that he tabulates a statement which, as he contends, shows that the earnings during that year were sufficient to pay the operating expenses and fixed charges. We give the table as he has prepared it:

Gross earnings from operation..		$3,568,690 26
Less operating expenses.....		2,986,204 12
Income from operation.....		$ 582,486 14
To which should be added amounts expended for "cost of road, equipment, and permanent improvements," admitted to have been included in operating expenses		302,085 77
Dividends on (compress) stocks owned		8,020 00
Total income		$ 892,591 91
Deductions from Income.		
Interest on funded debt accrued during the year, viz.:		
On $7,954,000 first mortgage bonds at 6%	$477,240 00	
On $7,054,000 second mortgage bonds, one month, at 6%	35,270 00	
On $7,054,000 second mortgage bonds, eleven months, at 4½% ..	290,977 50	
Total interest accrued	$803,487 50	
Rental paid Colorado River Bridge Company	14,583 32	
Taxes	28,951 35	
Total deductions		$847,022 17
Surplus after paying operating expenses proper, interest accrued on bonds, taxes, etc.		$ 45,569 74

But this table ignores that which is disclosed in the cross bill, to wit, $750,000 in certificates of indebtedness, bearing interest at 5 per cent., and $1,250,000 third mortgage bonds, bearing 4 per cent. interest, the interest on which sums would exceed all the apparent surplus. These items also appear in the report, under the head of "Current Liabilities," the total balance of which on July 1, 1892, is given as $3,772,062.94, which sum may not unreasonably be taken as showing by how much the company has fallen short of paying its operating expenses and fixed charges. Again, the sum of $302,085.77 appears in that table, under the description "Cost of road, equipment, and permanent improvements, admitted to have been included in operating expenses," and is added to the income, as though it had been improperly included in operating expenses. But, before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of $302,085.77 is one of $113,212.09 for rails; and it appears from the same report that there was not a dollar expended for rails, except as included within this amount. Now, it goes without saying that in the operation of every road there is a constant wearing out of the rails, and a constant necessity for replacing old with new. The purchase of these rails may be called "permanent improvements," or by any other name, but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of "Renewals of Rails and Ties," is stated the number of tons of "new rails laid" on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions, it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company. Certainly, the mere title under which these expenditures are once stated, is not sufficient to overthrow the facts —so fully and clearly shown—that the stockholders have never received any dividends; that in order to meet the accumulating interest on the bonds they have had to put their hands in their pockets, and advance a million and over of dollars. Those are facts whose significance cannot be destroyed by any mere manner of bookkeeping or classification of expenditures.

Further, the attorney general asserts that there are five trunk lines, of which the International & Great Northern road is one, paralleling each other, and thus dividing the business of the territory through which they pass; that the state of Texas had made large donations of land to railroad companies; and that, as appears from its executive documents, this railroad company had received a donation of 3,352,320 acres to aid in its construction, as well as exemption of all its property from taxation for 25 years. He also calls attention to the financial depression which has of late years pervaded every avenue of trade, and adds a table from the report of the commissioner of agriculture of Texas, showing, as to different articles produced in that state, an increase in the amount of product, and a decrease in the prices re-

ceived therefor, all of which considerations, he earnestly insists, affect the question of the reasonableness of the rates prescribed.

None of the matters mentioned in the foregoing paragraph appear in the pleadings, or elsewhere in the record, and it is therefore doubtful to what extent they may be taken into consideration. If we may take judicial notice of the five parallel roads, must we also assume that the existence of the other four diminishes the business of the International & Great Northern, and that, if they had never been built, all the business which now passes over the five would have been carried by the one? May not the topography of the country be such as to prevent any of the business of the other roads from ever coming to the International & Great Northern, even if, without them, it was obliged to seek water or wagon transportation? May not the building of those other roads have increased the population and business to such an extent that the overflow has, so far from diminishing, really resulted in an increase of, the business of the International & Great Northern? If there has been a division of business, has there not also been a competition by which the rates have been reduced, and reduced to such an extent as to forbid the propriety of any further reduction? If we may take judicial notice that the state made a grant of three million and odd acres to the company, must we also take notice of the value of that land, of its sale, and the amount realized therefrom? While, undoubtedly, there has been lately a period of financial depression, can we take judicial notice of the extent to which that depression has reduced the prices of the products of the state? And is the report of the commissioner of agriculture of the state to be considered as evidence before us, and accepted as substantially correct, both as to product and prices? And if the depreciation of prices, as stated in said report, be accepted as correct, will such depreciation uphold a compulsory reduction of the rates of transportation to such an extent that some of those who have invested their money in railroad transportation receive no compensation therefrom? Is it just to deprive one party of all compensation in order that another may make some profit? They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business; and, as appears from other cases submitted to us with this, some of the railroads in the state of Texas have been operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business which cannot be abandoned at will, to so reduce their charges for service as to make the carrying on of that business result in a continued loss. In the one case the law is powerless to prevent injury. In the other, it is used to work injury. Counsel suggest that the state itself may construct and operate railroads, and then may properly make rates so low that the business is done at a loss. They refer to the postal system of the United States, which, carried on for the common welfare, not infrequently results in a loss, which is made good out of the public treasury. But the parallel is not good. In the case suggested the loss is cast, through taxation, upon the general public, and all bear their proportionate share of that loss which is incurred in securing a common benefit, while the scope of this legislation is to secure such common benefit at the expense of a single class. The equal protection of the laws—the spirit of common justice—forbids that one class should, by law, be compelled to suffer loss that others may make gain. If the state were to seek to acquire the title to these roads under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation,—that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take, not the title, but the use, for the public benefit, at less than its market value?

The act of 1853, to which reference has already been made, contained a section looking to the acquisition by the state of the title to railroad property. Section 17 of the act (Gen. Laws Tex. 1853, p. 58) is as follows:

"If the legislature of this state shall at any time make a provision by law for the repayment to any such company of the amount expended by them in the construction of said road, together with all moneys for permanent fixtures, cars, engines, machinery, chattels, and real property then in use for the said road, with all moneys expended for repairs or otherwise, and interest on such sums at the rate of twelve per centum per annum, after deducting the amount of tolls, freights, passage money, and all moneys received from the sale of lands donated by the state to said company, with twelve per centum per annum interest on all such sums, then the road, with all its fixtures and appurtenances aforesaid, and all the lands donated to the same by the state and remaining unsold, shall vest in and revert to the state: provided, that the state shall not be required to pay or allow a greater rate of interest on any amount of the money so expended by any company which shall have been borrowed from this state than the state shall have received for the same from such company."

This section, as will be perceived, provides for the payment of interest at the high rate of 12 per cent. on the difference between what the company has paid out and what it has taken in, and to that extent evidences the thought of the state that justice required the

return to the builders of railroads of something more than the actual cost, as the condition of depriving them of the title. It is only significant, however, as an expression of the thought of the state at the time; for, were the provision ever so unjust, every corporation which, after the passage of the act, invested its money in building a road, would do so with the knowledge that that was the condition upon which the investment was made, and could not, therefore, challenge its validity.

And now what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was $40,000,000. It cannot be replaced today for less than $25,000,000. There are $15,000,000 of mortgage bonds outstanding against it, and nearly $10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates were insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest, the stockholders have put their hands in their pockets, and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employes have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate, in cents, per ton, per mile, has decreased in 10 years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over $150,000. Can it be that a tariff which, under these circumstances, has worked such results to the parties whose money built this road, is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff. There may have been extravagance, and a needless expenditure of money. There may be waste in the management of the road, enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value. The road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff, as established, is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for 10 years steadily decreasing, until the aggregate decrease has been more than 50 per cent.; that, under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment, so supported, will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree restraining it being put in force.

It follows from these considerations that the decree, as entered, must be reversed, in so far as it restrains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations, but must be affirmed so far only as it restrains the defendants from enforcing the rates already established. The costs in this court will be divided. Decree accordingly.

Where a state, by law, specifically prescribes the maximum rates of charge, the courts can also give relief, if such rates are so unreasonably low as practically to destroy the property of the company. Such a law deprives the company of property without due process of law, and also deprives it of the equal protection of the laws, thus violating the fourteenth amendment of the United States constitution. St. Louis & San Francisco Railway Co. v. Gill (1895) 156 U. S. 649, 15 Sup. Ct. 484.

Error to State court. Double damages for killing stock. Fourteenth amendment. Police power. Punitive damages.

MINNEAPOLIS & ST. LOUIS RAILWAY CO. v. BECKWITH.

(129 U. S. 26, 9 Sup. Ct. 207.)

Supreme Court of the United States. Jan. 7, 1889.

In error to the circuit court of Kossuth county, state of Iowa.

Eppa Hunton, for plaintiff in error.

FIELD, J. This case comes before us from the circuit court of Kossuth county, Iowa, the highest court of that state in which the controversy between the parties could be determined. Rev. St. § 709. It was an action for the value of three hogs run over and killed by the engine and cars of the Minneapolis & St. Louis Railway Company, a corporation existing under the laws of Minnesota and Iowa, and operating a railroad in the latter state. The killing was at a point where the defendant had the right to fence its road. The action was brought before a justice of the peace of Kossuth county. Proof having been made of the killing of the animals, and of their value, and that notice of the fact, with affidavit of the injury, had been served upon an officer of the company in the county where the injury was committed more than 30 days before the commencement of the action, the justice gave judgment for the plaintiff against the company for $24, double the proved value of the animals. The case was then removed to the circuit court of Kossuth county, where the judgment was affirmed. To review this latter judgment the case is brought here on writ of error.

The judgment rendered by the justice was authorized by section 1289 of the Code of Iowa, which is as follows: "Any corporation operating a railway that fails to fence the same against live stock running at large at all points where such right to fence exists shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the willful act of the owner or his agent; and in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damage done to such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officer, station or ticket agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto." The validity of this law was assailed in the state court, and is assailed here, as being in conflict with the first section of the fourteenth amendment of the constitution of the United States, in that it deprives the railway company of property without due process of law, so far as it allows a recovery of double the value of the animals killed by its trains; and in that it denies to the company the equal protection of the laws by subjecting it to a different liability for injuries committed by it from that to which all other persons are subjected.

It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in Santa Clara Co. v. Railroad Co., 118 U. S. 394, 396, 6 Sup. Ct. Rep. 1132, and the doctrine was reasserted in Mining Co. v. Pennsylvania, 125 U. S. 181, 189, 8 Sup. Ct. Rep. 737. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.

We will consider the objections of the railway company in the reverse order in which they are stated by counsel. And *first*, as to the alleged conflict of the law of Iowa with the clause of the fourteenth amendment ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. That clause does undoubtedly prohibit discriminating and partial legislation by any state in favor of particular persons as against others in like condition. Equality of protection implies, not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind. But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order, and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease, and danger in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society. When the calling, profession, or business of parties is unattended with danger to others, little legislation will be necessary respecting it. Thus, in the purchase and sale of most articles of general use, persons may be left to exercise their own good sense and judgment; but when the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. Thus, if one is engaged in the manufacture or sale of explosive or inflammable articles, or in the preparation or sale of medicinal drugs, legislation for the security of society may prescribe the terms on which he will be permitted to carry

on the business, and the liabilities he will incur from neglect of them. The concluding clause of the first section of the fourteenth amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. Such has been the ruling of this court in numerous instances where that clause has been invoked against legislation supposed to be in conflict with it. Thus in Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, it was objected that a municipal ordinance of San Francisco, prohibiting washing and ironing in public laundries within certain designated limits of the city between the hours of 10 at night and 6 in the morning, was in conflict with that amendment, in that it discriminated between laborers engaged in the laundry business and those engaged in other kinds of business, and between laborers employed within the designated limits and those without them. But the court held that the provision was merely a police regulation; that it might be a necessary measure of protection in a city composed largely of wooden buildings, like San Francisco, that occupations in which fires are constantly required should cease during certain hours at night, and of the necessity of such a regulation that municipal body was the exclusive judge; that the same authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits within which wooden buildings must not be constructed; and that restrictions of this kind, though necessarily special in character, do not furnish ground of complaint if they operate alike upon all persons or property under the same circumstances and conditions. "Class legislation," said the court, "discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730, an objection was taken to a similar ordinance of San Francisco that it made an unwarrantable discrimination against persons engaged in the laundry business, because persons in other kinds of business were not required to cease from labor during the same hours at night. But, the court said, there may be no risks attending the business of others, certainly not as great as where fires are constantly required; and that specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon business of a different kind. "The discriminations, which are open to objection," the court added, "are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

In Railway Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110, a statute of Missouri requiring every railroad corporation within it to erect and maintain fences and cattle-guards on the sides of its roads, where the same passed through, along, or adjoining inclosed or cultivated fields, or uninclosed lands, and, if it did not, making it liable in double the amount of damages to animals caused thereby, was assailed as in conflict with the fourteenth amendment on the same grounds urged in the present case; namely, that it deprived the defendant of property without due process of law, so far as it allowed a recovery of damages for stock killed or injured in excess of its value, and also that it denied to the defendant the equal protection of the laws, by imposing upon it a liability for injuries committed which was not imposed upon other persons. But the court said that authority for requiring railroads to erect fences on the sides of their roads, so as to keep horses, cattle, and other animals from going upon them, was found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations; that in few instances could that power be more wisely or beneficently exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattle-guards; that they are absolutely essential to give protection against accidents in thickly-settled portions of the country; that the omission to erect and maintain them, in the face of the law, would justly be deemed gross negligence; and that if injuries to property are committed, something beyond compensatory damages might be awarded in punishment of it. Referring to the rule which prevails of allowing juries to assess exemplary or punitive damages where injuries have resulted from neglect of duties, the court said: "The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages." And as to the objection that the statute of Missouri denied to the defendant the equal protection of the laws, the court said that it made no discrim-

ination against any railroad company in its requirement; that each company was subject to the same liabilities, and from each the same security was exacted by the erection of fences, gates, and cattle-guards, when its road passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands; and that there was no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances. In Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, a statute of Kansas providing that "every railroad company doing business in that state should be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage," was assailed on the ground that it was in conflict with the fourteenth amendment to the constitution, in that it deprived the company of its property without due process of law, and denied to it the equal protection of the laws. In support of the first position the company referred to the rule of law that prevailed previously in Kansas and some other states exempting from liability an employer for injuries to employes caused by the incompetency or negligence of a fellow-servant, and contended that the law of Kansas in creating, on the part of the railroad company, a liability in such cases not previously existing, in the enforcement of which their property might be taken, authorized the taking of property without due process of law, and imposed a special liability upon railway companies that was not imposed upon other persons, and thus denied to the former the equal protection of the laws. But the court answered that the law in question applied only to injuries subsequently committed, and that it would not be contended that the state could not prescribe the liabilities under which corporations created by its laws should conduct their business in the future, where no limitation was placed upon its power in that respect by their charters; that whatever hardship or injustice there might be in any law thus applicable to the future must be remedied by legislative enactment; that the objection that the railroad company was denied the equal protection of the laws rested upon the theory that legislation special in its character was within the constitutional inhibition, but that, so far from such being the fact, the greater part of all legislation was special, either in the objects sought to be attained by it or in the extent of its application; that when such legislation applied to particular bodies or associations, imposing upon them additional liabilities, it was not open to the objection that it denied to them the equal protection of the laws, if all persons brought under its influence were treated alike under the same conditions; that the hazardous character of the business of operating a railway called for special legislation, with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public, which was not required by the business of other corporations not subject to similar dangers to their employes; and that the legislation in question met a particular necessity, and all railroad corporations without distinction were subject to the same liabilities.

From these adjudications it is evident that the fourteenth amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just. The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accident by collision, not only with other trains, but with animals. A collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers. Where these companies have the right to fence in their tracks, and thus secure their roads from cattle going upon them, it would seem to be a wise precaution on their part to put up such guards against accidents at places where cattle are allowed to roam at large. The statute of Iowa, in fixing an absolute liability upon them for injuries to cattle committed in the operation of their roads by reason of the want of such guards, would seem to treat this precaution as a duty. It is true that, by the common law, the owner of land was not compelled to inclose it, so as to prevent the cattle of others from coming upon it, and it may be that, in the absence of legislation on the subject, a railway corporation is not required to fence its railway, the common law as to inclosing one's land having been established long before railways were known. But the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to insure safety in the movement of its trains, is plainly implied by the statute of Iowa, which also indicates that the putting up of fences would be such reasonable means of safety. If, therefore, the company omits those means, the omission may well be regarded as evidence of such culpable negligence as to justify punitive damages where injury is committed; and if punitive damages in such cases may be given, the legislature may prescribe the extent to which juries may go in awarding them.

The law of Iowa under consideration is less open to objection than that of Missouri, which was sustained in the case cited above. There double damages could be claimed by the owner whenever his cattle had strayed upon the track of the railway company for want of fences on its sides, and had been killed or injured by the railway trains. Here such damages can be claimed for like injuries to cattle only where the company has received notice and affidavit of the injury committed 30 days before the commencement of the ac-

tion, and has persisted in refusing to pay for the value of the property destroyed or the damage caused. There must be not merely negligence of the company in not providing guards against accidents of the kind, but also its refusal to respond for the actual damage suffered. Without the additional amount allowed there would be few instances of prosecutions of railroad companies where the value of the animals killed or injured by them is small, as in this case; the cost of the proceeding would only augment the loss of the injured party. As said in the Missouri case cited: "The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages."

The legislation in question has been sustained in numerous instances by the supreme court of Iowa. In Welsh v. Railroad Co., 53 Iowa, 632, 6 N. W. Rep. 13, which was an action to recover double the value of a horse alleged to have been killed by one of the defendant's engines at a point where it had the right to fence the road, the court below instructed the jury that it was the duty of the company to fence its road against live stock running at large at all points where such right to fence existed; and it was objected to this instruction that no such duty existed, upon which the supreme court of the state, to which the case was taken, said: "While it is true the statute does not impose an abstract duty or obligation upon railroad companies to fence their roads, yet as to live stock running at large a failure to fence fixes an absolute liability for injuries occurring in the operation of the road by reason of the want of such fence. The corporation owes a duty to the owners of live stock running at large either to fence its road, or to pay for injuries resulting from the neglect to fence." And in Bennett v. Railway Co., 61 Iowa, 355, 16 N. W. Rep. 210, the same court said: "We think the only proper construction of the statute is that, in order to escape liability, the company must not only fence, but keep the road sufficiently fenced; and this has been more than once ruled." As it is thus the duty of the railway company to keep its track free from animals, its neglect to do so, by adopting the most reasonable means for that purpose,—the fencing of its roadway, as indicated by the statute of Iowa,—justly subjects it, as already stated, to punitive damages, where injuries are committed by reason of such neglect. The imposition of punitive or exemplary damages in such cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law. It is only one mode of imposing a penalty for the violation of duty, and its propriety and legality have been recognized, as stated in Day v. Woodworth, 13 How. 363, 371, by repeated judicial decisions for more than a century. Its authorization by the law in question to the extent of doubling the value of the property destroyed, or of the damage caused, upon refusal of the railway company, for 30 days after notice of the injury committed, to pay the actual value of the property or actual damage, cannot, therefore, be justly assailed as infringing upon the fourteenth amendment of the constitution of the United States.

Judgment affirmed.

INTERSTATE COMMERCE ACT.

(24 Stat. 379; 25 Stat. 856, 860; 26 Stat. 743; 27 Stat. 443, 531.)

An Act to Regulate Commerce.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Sec. 6. (As amended March 2, 1889.) That every common carrier subject to the provi-

sions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the commission as is above provided in the case of an advance of joint rates. The commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the commission in force at the time.

The commission may determine and pre-

scribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 10. (As amended March 2, 1889.) That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: provided, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for

the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Sec. 11. That a commission is hereby created and established to be known as the inter-state commerce commission, which shall be composed of five commissioners, who shall be appointed by the president, by and with the advice and consent of the senate. The commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the president; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the commissioner whom he shall succeed. Any commissioner may be removed by the president for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said commissioners shall not engage in any other business, vocation or employment. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

Sec. 12. (As amended March 2, 1889, and February 10, 1891.) That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the

proper court and to prosecute under the direction of the attorney-general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation depending before the commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the commission, or agreed upon by the parties by stipulation in writing to be filed with the commission. All depositions must be promptly filed with the commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Sec. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any state or territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed

because of the absence of direct damage to the complainant.

Sec. 14. (As amended March 2, 1889.) That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.

All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the commission therein contained, in all courts of the United States, and of the several states, without any further proof or authentication thereof. The commission may also cause to be printed for early distribution its annual reports.

Sec. 15. That if in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the commission; and if, within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Sec. 16. (As amended March 2, 1889.) That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the constitution of the United States, it shall be lawful for the commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process mandatory or otherwise, to pay such sum of mon-

ey, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the supreme court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the commission it shall be the duty of the district attorney, under the direction of the attorney-general of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

If the matters involved in any such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the supreme court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

Sec. 17. (As amended March 2, 1889.) That the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commission shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said commission and be heard, in person or by attorney. Every vote and official act of the commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said commission shall have an official seal, which shall be judicially noticed. Either of the members of the commission may administer oaths and affirmations and sign subpœnas.

Sec. 18. (As amended.) That each commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the commission may hire suitable offices for its use, and shall have authority to procure all necessary office sup-

plies. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the commission.

Sec. 19. That the principal office of the commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the commission may hold special sessions in any part of the United States. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

Sec. 20. That the commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the commission may require; and the said commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Sec. 21. (As amended March 2, 1889.) That the commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to congress, and copies of which shall be distributed as are the other reports transmitted to congress. This report shall contain such information and data collected by the commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the commission may deem necessary; and the names and compensations of the persons employed by said commission.

Sec. 22. (As amended March 2, 1889, and February 8, 1895.) That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: provided, that no pending litigation shall in any way be affected by this act: provided further, that nothing in this act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the interstate commerce commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be car-

ried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the interstate commerce commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the commission in force at the time. The provisions of section ten of this act shall apply to any violation of the requirements of this proviso.

NEW SECTION (Added March 2, 1889). That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.

Public Act No. 41, approved February 4, 1887, as amended by Public Acts No. 125, approved March 2, 1889, No. 72, approved February 10, 1891, and No. 38, approved February 8, 1895.

An act in relation to testimony before the interstate commerce commission, and in cases or proceedings under or connected with an act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and amendments thereto.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the interstate commerce commission or in obedience to the subpœna of the commission, whether such subpœna be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna or the subpœna of either of them, or in any such case or proceeding: provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

Public Act No. 54, approved February 11, 1893.

An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driv-

ing-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Sec. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the interstate commerce commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the interstate commerce commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several ganges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the interstate commerce commission, said commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the interstate commerce commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred. And it shall also be the duty of the interstate commerce commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: provided, that nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

Sec. 7. That the interstate commerce commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Public Act No. 113, approved March 2, 1893.

An act supplementary to the act of July first, eighteen hundred and sixty-two, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," and also of the act of July second, eighteen hundred and sixty-four, and other acts amendatory of said first-named act.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the acts incorporating them, or by any act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain, and operate, for railroad, govermental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed

by them under the acts making the grants as aforesaid.

Sec. 2. That whenever any telegraph company which shall have accepted the provisions of title sixty-five of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of said railroad or telegraph companies, referred to in the first section of this act, said telegraph company so extending its line shall have the right and said railroad or telegraph company shall allow the line of said telegraph company so extending its line to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

Sec. 3. That if any such railroad or telegraph company referred to in the first section of this act, or company operating such railroad or telegraph line shall refuse or fail, in whole or in part, to maintain, and operate a telegraph line as provided in this act and acts to which this is supplementary, for the use of the government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the interstate commerce commission, whose duty it shall thereupon be, under such rules and regulations as said commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or telegraph company concerned shall abide by and perform such order; and it shall be the duty of the interstate commerce commission, when such determination and order are made, to notify the parties concerned, and, if necessary, enforce the same by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of either of said interstate commerce commissioners: provided, that the said commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

Sec. 4. That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the attorney-general of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation.

Sec. 5. That any officer or agent of said railroad or telegraph companies, or of any company operating the railroads and telegraph lines of said companies, who shall refuse or fail to operate the telegraph lines of said railroad or telegraph companies under his control, or which he is engaged in operating, in the manner directed in this act and by the acts to which it is supplementary, or who shall refuse or fail, in such operation and use, to afford and secure to the government and the public equal facilities, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business, as herein provided for, without any discrimination whatever for or adverse to the telegraph line of any or either of said connecting companies, or shall refuse to abide by, or perform and carry out within a reasonable time the order or orders of the interstate commerce commission, shall in every such case of refusal or failure be guilty of a misdemeanor, and, on conviction thereof, shall in every such case be fined in a sum not exceeding one thousand dollars, and may be imprisoned not less than six months; and in every such case of refusal or failure the party aggrieved may not only cause the officer or agent guilty thereof to be prosecuted under the provisions of this section, but may also bring an action for the damages sustained thereby against the company whose officer or agent may be guilty thereof, in the circuit or district court of the United States in any state or territory in which any portion of the road or telegraph line of said company may be situated; and in case of suit process may be served upon any agent of the company found in such state or territory, and such service shall be held by the court good and sufficient.

Sec. 6. That it shall be the duty of each and every one of the aforesaid railroad and telegraph companies, within sixty days from and after the passage of this act, to file with the interstate commerce commission copies of all contracts and agreements of every description existing between it and every other person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated; and it shall be the duty of each and every one of said railroad and telegraph companies annually hereafter to report to the interstate commerce commission, with reasonable fullness and certainty, the nature, extent, value, and condition of the telegraph lines and property then belonging to it, the gross earnings, and all expenses of maintenance, use, and operation thereof, and its relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports which said commission shall prescribe; and if any of said railroad or telegraph companies shall refuse or fail to make such reports or any report as may be called for by said commission, or refuse to submit its books and records for inspection, such neglect or refusal shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand dollars nor more than five thousand dollars, to be recovered by the attorney-general of the United States, in the name and for the use and benefit of the United States; and it shall be the duty of the interstate commerce commission to inform the attorney-general of all such cases of neglect or refusal, whose duty it shall be to proceed at once to judicially enforce the forfeitures hereinbefore provided.

Sec. 7. That nothing in this act shall be construed to affect or impair the right of congress, at any time hereafter, to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal as, in the opinion of congress, justice or the public welfare may require; and nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in the United States, or any authority that the postmaster-general now has under title sixty-five of the Revised Statutes to fix rates, or, of the government, to purchase lines as provided under said title, or to have its messages given precedence in transmission.

Public Act No. 237, approved August 7, 1888.

The foregoing act, of February 11, 1893, is a valid exercise of legislative power in providing for the compulsory disclosure of criminating evidence. As it protects the witness from any criminal prosecution, the fifth amendment is not violated. Brown v. Walker (1896) 161 U. S. 591, 16 Sup. Ct. 644; distinguishing Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195.

"THE SHERMAN ANTI-TRUST ACT."

(26 Stat. 209.)

An act to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. that the word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

Approved July 2, 1890.

This act gives the courts power to restrain, by injunction, violations of its provisions by combination of railroad employés to obstruct railroad commerce U. S. v. Debs, 64 Fed. 724. Cf. In re Debs, 158 U. S. 564, 15 Sup. Ct. 900.

Purpose of Act. Just discriminations and reasonable preferences are still permitted. Party-rate tickets. English Railway and Canal Traffic Act. Undue preferences. Scalpers.

INTERSTATE COMMERCE COMMISSION v. BALTIMORE & OHIO R. R. CO.

(145 U S. 263, 12 Sup. Ct. 844.)

Supreme Court of the United States. May 16, 1892.

Appeal from the circuit court of the United States for the southern district of Ohio.

Bill by the Interstate Commerce Commission to enjoin the Baltimore & Ohio Railroad Company from continuing to violate an order of the commission requiring it to desist from using "party rate" tickets. The bill was dismissed in the circuit court. 43 Fed. Rep. 37. The commission appeals. Affirmed.

STATEMENT BY MR. JUSTICE BROWN.

This proceeding was originally instituted by the filing of a petition before the Interstate Commerce Commission by the Pittsburg, Cincinnati & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices, as required by law. The petition set forth that the two roads were competitors from Pittsburg westward; that the Baltimore & Ohio road had in operation upon its competing lines of road so-called "party rates," whereby "parties of ten or more persons traveling together on one ticket will be transported over said lines of road between stations located thereon at two cents per mile *per capita*, which is less than the rate for a single person; said rate for a single person being about three cents per mile."

There was another charge that the defendant was in the habit of selling excursion tickets without posting its rates for the same in its offices, but this charge was subsequently abandoned.

The answer of the Baltimore & Ohio Railroad Company admitted that it had at one time in effect the so-called "party rates," but prior to the filing of the complaint had withdrawn said rates, not that it believed that they were illegal, but because it was claimed by other companies that said rates were put into effect in violation of an agreement between companies belonging to a certain association of which defendant was a member. It further averred that said rates were in no way a violation of the act to regulate commerce, and were an accommodation to the public, necessary to the business of theatrical and other amusement companies, and that, when the legality of such rates was properly raised for decision, it was prepared to defend the legality of the same. The answer further denied the right of the complainant to institute the proceeding, and prayed that the complaint might be dismissed.

The cause was heard before the commission, which found "that so-called 'party rate' tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets, within the meaning of section 22 of the act to regulate commerce, and that, when the rates at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore and Ohio Railroad Company, do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons traveling together in one party which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the commission, on May 1, 1890, pursuant to section 16 of the interstate commerce act, filed this bill in the circuit court of the United States for the southern district of Ohio for a writ of injunction to restrain the defendant from continuing in its violation of the order of the commission. The bill set up the proceedings which had theretofore been taken before the commission, and set forth as its *gravamen* that the defendant had wholly disregarded and set at naught the authority and order of the commission in that regard, and had willfully and knowingly disobeyed said order, and had not ceased and desisted from allowing party rates as it had been ordered to do, and had upon divers occasions since the service of said order charged rates for the transportation over its lines of a number of persons traveling together in one party which were less for each person than rates contemporaneously charged under schedules lawfully in effect between the same points for the transportation of persons, citing a number of instances of such disobedience.

The answer admitted the proceedings set forth in the bill, but denied that it had been made to appear to the commission that defendant had violated the provisions of the act to regulate commerce, or that the commission had duly and legally determined the matters and things in controversy and at issue between the parties; and averred that several of the conclusions of fact stated in the report of the commission were not true, or justified by the evidence produced at the hearing; and that the conclusions of law contained in the report, and the interpretation therein given to the act, were not correct. It admitted that it had not wholly ceased charging rates for transportation over its lines for a number of passengers traveling together in one party upon one ticket, which are less for each person than rates contemporaneously charged by it for the transportation of single passengers be-

tween the same points, and admitted a violation of the order of the commission.

The seventh and eighth paragraphs of the answer are the material ones, and are here given in full:

"(7) That for many years prior to the passage of the said 'act to regulate commerce,' all the railroad carriers in the United States had habitually made a rate of charge for passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points, and such lower rates were universally made at the date of the passage of said act. To carry on this universal practice many forms of tickets were employed to enable different classes of passengers to enjoy these lower rates, and so stimulate travel. To meet the needs of the commercial traveler the thousand-mile ticket was used; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were used, *e. g.*, monthly or quarterly tickets, good for any number of trips within the specified time, and ten, twenty-five, or fifty trip tickets, good for the specified number of trips by one person, or for one trip by the specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for the purpose; to accommodate excursionists traveling in numbers too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were issued also between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for reduction of the charge *per capita*, then such reduction was reasonable and just in the interests both of the carrier and of the public. Long experience has proved the soundness of the principle. Under its application grew up the business of commercial travelers, the enormous suburban business, the constant travel between large cities, and the excursion business. Under its application has grown up also the business of traveling companies or parties, which has reached an aggregate of many hundreds of thousands of dollars, and which depends for its existence upon a continuance of the transportation rates under which it has grown up.

"(8) That since the passage of the said 'act to regulate commerce' this respondent has continued as theretofore the practice above stated of making a lower charge on passenger travel, in consideration of the amount and frequency of the travel, and with that purpose, and to accommodate the various classes of passengers, it has continued in use all the forms of ticket described in the next preceding section. That the charge fixed by it for the transportation of parties of ten or more, on a single ticket, has been two cents per mile *per capita*, which is the same rate charged on thousand-mile tickets, and is a higher rate than it charges on long distance passenger travel and excursion travel, and higher than its general rate for suburban travel on time or other suburban tickets. That the said charge for the transportation of parties on a single ticket is just and reasonable, affording a fair compensation to the carrier, and for the best interests both of the carrier and of the public, because any higher rate would destroy the business. That the business reasons, circumstances, and conditions which induced this respondent to make such lower charge for the transportation of parties as aforesaid, and that make it the interest of this respondent as a carrier to make such lower charge, are precisely the same reasons, circumstances, and conditions that induce it and make it its interest to fix a lower charge for the transportation of passengers buying mileage tickets, time or trip tickets, and excursionists. That while so-called 'party rate' tickets are used principally by traveling amusement companies, because no other form of ticket meets the requirement of such companies, yet this respondent has avoided confining such tickets to any class of business, by offering them on the same terms to the public at large. That this respondent has obviated the danger that such lower charge for parties might be taken advantage of by speculators or ticket brokers, by issuing only one ticket for the whole party. And respondent avers that as such tickets are now issued by it they are not and cannot be used for speculative purposes, and afford no opportunity for evading the law in the hands of ticket brokers. This respondent further avers that it may rightly and legally make a charge *per capita* for persons traveling on said party rate tickets, lower than its charge for a single passenger making one trip between the same points, the character, circumstances, and conditions of the service being substantially different; and that the making of such lower charge *per capita* to the member of the party makes or gives no undue or unreasonable preference or advantage to him, and subjects no person, company, firm, corporation, or locality, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The answer further averred the illegality of the order of the commission, and averred "that by the true construction of the act the second section thereof requires the same charge for transportation service only in cases where the commercial circumstances and conditions are substantially similar, and the third section requires the same charge to be made only when a difference in charge would work a prejudice or disadvantage to some one without reason therefor; that the twenty-second section, so far from making exceptions to an otherwise absolute rule, was inserted merely as additional precaution to insure the giving to the second and third sections of the act the construction which congress intended; that the twenty-second section is a legislative declaration; that under the provisions of the second section of the act circumstances and conditions of a commercial nature are to be considered, and among such circumstances and conditions, in the case of pas-

senger traffic, the amount of service purchased or contracted for, and the interest of the carrier in stimulating travel, are to be considered."

Upon the hearing before the circuit court upon pleadings and proofs the bill was dismissed, separate opinions being delivered by Judges JACKSON and SAGE. 43 Fed. Rep. 37. From this decree the Interstate Commerce Commission appealed to this court. The provisions of the interstate commerce act, so far as the same are material to this case, are set forth in the margin.[1]

S. Shellabarger, J. M. Wilson, and *A. G. Safford,* for appellant. *John K. Cowen* and *Hugh L. Bond, Jr.,* for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

Prior to the enactment of the act of February 4, 1887, (24 St. p. 379,) to regulate commerce, commonly known as the "Interstate Commerce Act," railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service,—Railroad Co. v. Gage, 12 Gray, 393; Baxendale v. Railway Co., 4 C. B. (N. S.) 63; Railway Co. v. Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 385; Johnson v. Railway Co., 16 Fla. 623,—though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the states acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the state, the impossibility of securing concerted action between the legislatures towards the regulation of traffic between the several states, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by congress under its constitutional power to regulate commerce among the several states. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where

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[1] AN ACT TO REGULATE COMMERCE.

"Section 1. That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage of shipment. * * *

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"Sec. 22, (as amended by section 9 of act of March 2, 1889, c. 382, 25 St. pp. 855, 862.) That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employes, or prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: provided, that no pending litigation shall in any way be affected by this act."

such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute,—only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburgh; but, if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice BLACKBURN in Railway Co. v. Sutton, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is whether the principle above stated, as applicable to two individuals, applies to the purchase of a single ticket covering the transportation of 10 or more persons from one place to another. These are technically known as "party rate tickets," and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns, or cities and suburban towns. The party rate ticket upon the defendant's road is a single ticket, issued to a party of 10 or more, at a fixed rate of 2 cents per mile, or a discount of one third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted, and open to the public at large.

But, assuming the weight of evidence in this case to be that the party rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named shou not be deemed unjust. It does not fo. low, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance are property of the United States, state, or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion,—in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3; in other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or to go and return by the same road, is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same state must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or federal, wherein their legality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public,—it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them.

But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously within the commuting principle. As stated in the opinion of Judge SAGE in the court below: "The difference between commutation and party rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and

to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of 10 or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveler, the 1,000-mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and 10, 25, or 50 trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of 10 or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge *per capita*, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves, or unjust to others. These tickets, then, being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously towards any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburgh, Chicago & St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge JACKSON in the court below: "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in un-

due advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The English traffic act of 1854 contains a clause similar to section 3 of the interstate commerce act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In Hozier v. Railroad Co., 17 Sess. Cas. (D) 302, 1 Nev. & McN. 27, complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch court of session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties traveling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. "It provides," said the court, "for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain." This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So, in Jones v. Railway Co., 3 C. B. (N. S.) 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting of the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Upon the other hand, in Ransome v. Railway Co., 1 C. B. (N. S.) 437, where it was manifest that a railway company charged Ipswich merchants, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than it charged Peterboro merchants, who had made arrangements with it to carry large quantities over its lines, and that the sums charged the Peterboro merchants were fixed so as to enable them to compete with the Ipswich merchants, the court granted an injunction, upon the ground of an undue preference to the Peterboro merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In Oxlade v. Railway Co., 1 C. B. (N. S.) 454, a railway company was held justified in carrying goods for one person for a less rate than that at which it carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But, so far as relates to the question of "undue preference," it may be presumed that congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. Rep. 142.

There is nothing in the objection that party rate tickets afford facilities for speculation, and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party rate ticket, as it appears in this case, is a single ticket covering the transportation of 10 or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two thirds of the regular fare for that number of people. It is possible to conceive that party rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates; but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is therefore affirmed.

Regulation of interstate commerce by State legislature. Interstate Commerce Act. Franchise tax. Tax on cash in company's treasury: on gross receipts, without distinction as to their source.

FARGO v. MICHIGAN.

(121 U. S. 230, 7 Sup. Ct. 857.)

Supreme Court of the United States. April 4, 1887.

In error to the supreme court of the state of Michigan.

Ashley Pond, for plaintiff in error. Edward Bacon, for defendant in error.

MILLER, J. This is a writ of error to the supreme court of the state of Michigan to bring here for review a decree sustaining a demurrer to the complainant's bill in chancery, and dismissing the bill. The complainant brought suit as president of the Merchants' Dispatch Transportation Company, averring that said company is a joint-stock association organized and existing under the laws of the state of New York, and by the laws of that state authorized to sue in the name of its president. The bill, so far as it presents the questions on which this court can have jurisdiction, charges as follows:

"Second. That, during the year ending with the thirty-first day of December, A. D. 1883, the said transportation company was engaged in the business of soliciting and contracting for the transportation of freight required to be carried over connecting lines of railroad in order to reach its destination; and, for the prosecution of its said business, it had agencies located generally throughout the United States and the dominion of Canada. The said transportation company issued through bills of lading for such freight, and caused the same to be carried by the appropriate railroad companies, and, as compensation for its service in the premises, the said transportation company was paid by the said railroad companies a definite proportion of the through rate charged and collected by said companies for the carriage of said freights.

"Third. That during the said year the said transportation company was possessed of certain freight cars which were used and run by the railroad companies in whose possession they chanced from time to time to be for the transportation upon their own and connecting lines of railroad of through freight, principally between the city of New York, in the state of New York, and Boston, in the state of Massachusetts, and Chicago, in the state of Illinois, and other points and commercial centers in the west, north-west, and south-west, without the said state of Michigan; that said cars were not used for the carriage of freight between points situate within the said state of Michigan, but wholly for the transportation of freight, either passing through the state, or originating at points without said state and destined to points within, or originating at points within said state and destined to points without; that the said several railroad companies thus making use of said cars, during the said year, paid to the said transportation company as compensation therefor a definite sum per mile for the distance traveled by the said cars over their respective lines.

"Fourth. That the said transportation company during the said year was not running or interested in any special fast, through, or other stock, coal, or refrigerator car freight line, or doing business in or running cars over any of the railroads of said state of Michigan otherwise than as in the preceding paragraphs stated.

"Fifth. That prior to the first day of April, A. D. 1884, the commissioner of railroads of the state of Michigan transmitted to the said transportation company certain blank forms of a report to be made to him pursuant to the provisions of an act of the legislature of the state of Michigan approved June 5, 1883, entitled 'An act to provide for the taxation of persons, copartnerships, associations, car-loaning companies, corporations, and fast freight lines engaged in the business of running cars over any of the railroads of this state, and not being exclusively the property of any railroad company paying taxes on their gross receipts,' with the requirement that the said transportation company should make up and return said report to the office of said commissioner on or before the first day of April, 1884, under the penalties of said act; that, on or about said first day of April, in compliance with said demand, but protesting that the same was without authority of law, and that said act was invalid, —or, if valid, was not applicable to the said transportation company,—the said transportation company made and filed with said commissioner a report, duly verified, setting forth that the gross amount of the receipts of the said transportation company for the mileage of said cars during said year 1883, while in use in the transportation of freight between points without said state and passing through said state in transit, estimated and prorated according to the mileage of said cars within said state of Michigan while so in use, was the sum of $95,714.50; and while in the use of transportation of freight from points without to points within said state of Michigan, and from points within to points without said state, estimated and prorated according to the mileage of said cars within the state of Michigan while so in use, was the sum of $28,890.01, making in the aggregate the sum of $124,604.51; that during said year it received no moneys whatever on business done solely within the said state of Michigan and no moneys which were or could be regarded as earned during said year within the limits of said state of Michigan other than as hereinbefore and in said report set forth.

"Sixth. That by the terms of said act it is

the duty of said commissioner of railroads to make and file with the auditor general of said state of Michigan, prior to the first day of June each year, a computation based upon the report of each person, association, copartnership, or corporation taxable thereunder of the amount of tax to become due from them respectively, and each such person, association, copartnership, or corporation is required, on or before the first day of July in such year, to pay to the treasurer of said state of Michigan, upon the statement of the auditor general thereof, two and one-half per cent. upon its gross receipts as computed by the said commissioner of railroads, and derived from loaning, renting, or hiring of cars to any railroad or other corporation, association, copartnership, or party. It was also provided in said act that for the said taxes, and interest thereon, and the penalty imposed for delay in the payment thereof, the said state should have a lien upon all the property of the person, association, copartnership, or corporation so taxed, and, in default of the payment of said tax by and within the time so prescribed, the auditor general of said state was authorized to issue his warrant to the sheriff of any county in said state, commanding him to levy the same, together with ten per cent. for his fees, by distress and sale of any of the property of the corporation or party neglecting or refusing to pay such tax wherever the same may be found within the county or state.

"Seventh. That the said commissioner of railroads has computed and determined that the amount of the gross receipts of the said transportation company under the said act is the said sum of $28,890.01, and that there is due from said transportation company to the state of Michigan, as a tax thereon, the sum of $722.25, and has transmitted said computation to the said auditor general, and your orator shows that unless said tax is paid by the said transportation company on or before the first day of July, 1884, it will become the duty of the said auditor general under the said act, and the said auditor general threatens that he will proceed, to enforce payment of the said tax against said transportation company by the seizure and sale of the property of said transportation company under the provisions of said act.

"Eighth. That your orator is advised, and so charges, that the said act as to the said gross receipts of the said transportation company, or of any of its receipts or earnings from the use of its cars, within the state of Michigan, and the transaction of its business in the manner aforesaid, is in violation of the constitution of the United States and void, and that said act is inapplicable to the said transportation company, and inoperative for further reasons appearing upon its face, and that said transportation company is not amenable thereto.

"Ninth. That the chief office of the said transportation company for the transaction of corporate business was, during said year, and is, in the city of New York, in the state of New York, and that all the moneys earned by it, as set forth in the second and third paragraphs hereof, were paid to it at its said office; that said company, during said year, had no funds or property whatsoever within the state of Michigan, except cars in transit and office furniture in the possession of agents, and that during said year the said transportation company was subject to taxation, and was taxed, on account of its property and earnings, within and under the laws of the state of New York."

The bill then prays for a subpœna against William C. Stevens, auditor general of the state of Michigan, and for an injunction to prevent him from proceeding in the collection of said taxes. To this bill the defendant Stevens demurred, and the circuit court for the county of Washtenaw, in which this suit was brought, overruled that demurrer. From this decree the defendant appealed to the supreme court of the state, where the judgment of the lower court was reversed, the demurrer sustained, and the bill dismissed. To reverse that decree this writ of error was sued out.

The contention of the plaintiff in error is that the statute of Michigan, the material parts of which are recited in the bill, is void as a regulation of commerce among the states, which, by the constitution of the United States, is confided exclusively to congress. Article 1, § 8, cl. 3. It will be observed that the bill shows that the tax finally assessed by the auditor of state against the transportation company was for the $28,890.01 of the gross receipts which the company had returned to the commissioner as money received for the transportation of freight from points without to points within the state of Michigan, and from points within to points without that state, and that no tax was assessed on the $95,714.50 received for transportation passing entirely through the state to and from other states.

There is nothing in the opinion of the supreme court of the state, which is found in the transcript of the record, to explain this discrimination. There is nothing in the statute of the state on which this tax rests which makes such a distinction, nor is there anything in the commissioner's requirement for a report which suggests it. It must have been, therefore, upon some idea of the authorities of the state that the one was interstate commerce and the other was not, which we are at a loss to comprehend. Freight carried from a point without the state to some point within the state of Michigan as the end of its voyage, and freight carried from some point within that state to other states, is as much commerce among the states as that which passes entirely through the state from its point of original shipment to its destination. This is clearly stated and decided in the case of Reading R. Co. v.

Pennsylvania, commonly called the case of the State Freight Tax, 15 Wall. 232, in which it is held that a tax upon freight taken up within the state and carried out of it, or taken up without the state and brought within it, is a burden on interstate commerce, and therefore a violation of the constitutional provision that congress shall have power to regulate commerce with foreign nations and among the several states. And in Wabash Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, it is held that a statute attempting to regulate the rates of compensation for transportation of freight from New York to Peoria, in the state of Illinois, or from Peoria to New York, is a regulation of commerce among the states. The same principle is established in Crandall v. Nevada, 6 Wall. 35.

The statute of the state of Michigan of 1883, under which this tax is imposed, is entitled "An act to provide for the taxation of persons, copartnerships, associations, car-loaning companies, corporations, and fast freight lines engaged in the business of running cars over any of the railroads of this state, and not being exclusively the property of any railroad company paying taxes on their gross receipts." Sections 1 and 2 require reports to be made to the commissioner of railroads of the gross amonnt of their receipts for freight earned within the limits of the state from all persons and corporations running railroad cars within the state. The commissioner is by section 4 required to make and file with the auditor general, on the first day of June of each year, a computation of the amount of tax which would become due on the first day of July next succeeding from each person, association, or corporation liable to pay such taxes. Each one of these is by section 5 required to pay to the state treasurer, upon the statement of the auditor general, an annual tax of 2½ per cent. upon its gross receipts, as computed by the commissioner of railroads.

It will thus be seen that the act imposed a tax upon all the gross receipts of the Merchants' Dispatch Transportation Company, a corporation under the laws of the state of New York, and with its principal place of business in that state, on account of goods transported by it in the state of Michigan; and the bill states that the company carried no freight the transportation of which was between points exclusively within that state.

The subject of the attempts by the states to impose burdens upon what has come to be known as interstate commerce or traffic, and which is called in the constitution of the United States "commerce among the states," by statutes which endeavor to regulate the exercise of that commerce, as to the mode by which it shall be conducted, or by the imposition of taxes upon the articles of commerce, or upon the transportation of those articles, has been very much agitated of late years. It has received the attentive consideration of this court in many cases, and especially within the last five years, and has occupied congress for a time quite as long. The recent act, approved February 4, 1887, entitled "An act to regulate commerce," passed after many years of effort in that body, is evidence that congress has at last undertaken a duty imposed upon it by the constitution of the United States, in the declaration that it shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Congress has freely exercised this power so far as relates to commerce with foreign nations and with the Indian tribes, but in regard to commerce among the several states it has, until this act, refrained from the passage of any very important regulation upon this subject, except perhaps the statutes regulating steam-boats, and their occupation upon the navigable waters of the country.

With reference to the utterances of this court, until within a very short time past, as to what constitutes commerce among the several states, and also as to what enactments by the state legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing. Still we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the construction of the constitutional provision, and that these recent decisions leave no room to doubt that the statute of Michigan, as interpreted by its supreme court in the present case, is forbidden as a regulation of commerce among the states, the power to make which is withheld from the state.

The whole question has been so fully considered in these decisions, and the cases themselves so carefully reviewed, that it would be doing little more than repeating the language of the arguments used in them to go over the ground again. The cases of State Freight Tax and State Tax on Railway Gross Receipts, which were considered together, and decided at the December term, 1872, and reported in 15 Wall. 232–328, present the points in the case now before us perhaps as clearly as any which have been before this court. A statute of the state of Pennsylvania imposed upon all the railroad corporations doing business within that state, as well as steam-boat companies and others engaged in the carrying trade, a specific tax on each 2,000 pounds of freight carried, graduated according to the articles transported. These were arranged into three classes, on the first of which a tax of two cents per ton was laid, upon the second three cents, and upon the third five cents. The Reading Railroad Company, a party to the suit, in making its report under this statute, divided its freight

on which the tax was to be levied into two classes; namely, freight transported between points within the state, and freight which either passed from within the state out of it, or from without the state into it. The supreme court of the state of Pennsylvania decided that all the freight carried, without regard to its destination, was liable to the tax imposed by the statute. This court, however, held that freight carried entirely through the state from without, and the other class of freight brought into the state from without, or carried from within to points without, all came under the description of "commerce among the states," within the meaning of the constitution of the United States; and it held also that freight transported from and to points exclusively within the limits of the state was internal commerce, and not commerce among the states. The taxing law of the state was therefore valid as to the latter class of transportation, but with regard to the others it was invalid, because it was interstate commerce, and the state could lay no tax upon it. In that case, which was very thoroughly argued and very fully considered, the case of Crandall v. Nevada, 6 Wall. 35, was cited as showing, in regard to transportation, what was strictly internal commerce of a state and what was interstate commerce. The court said: "It is not at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried, is a regulation of carriage. The state may tax its internal commerce; but, if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state."

In the case of Erie Ry. Co. (a corporation of the state of New York) v. Pennsylvania (decided at the same time) 15 Wall. 282, it appeared that the road of that company was constructed for a short distance through a part of the state of Pennsylvania, and that a similar tax was levied upon it for freight carried over its road This was held to be invalid, for the reasons given in the Case of the Reading Road

In the other case of State Tax on Railway Gross Receipts, which was also a suit between the Reading Railway Company and the state of Pennsylvania, an act of the legislature of that state was relied on which declared that, "in addition to the taxes now provided by law, every railroad, canal, and transportation company incorporated under the laws of this commonwealth, and not liable to the tax upon income under existing laws, shall pay to the commonwealth a tax of three-fourths of one percentum upon the gross receipts of said company, and the said tax shall be paid semi-annually upon the first days of July and January, commencing on the first day of July 1866."

This tax was held to be valid. The grounds upon which it was distinguished from the one in the preceding case upon freight were that, the corporation being a creation of the legislature of Pennsylvania, and holding and enjoying all its franchises under the authority of that state, this was a tax upon the franchises which it derived from the state, and was for that reason within the power of the state, and that, in determining the mode in which the state could tax the franchises which it had conferred, it was not limited to a fixed sum upon the value of them, but it could be graduated by and proportioned to either the value of the privileges granted, or the extent or results of their exercise. "Very manifestly," said the court, "this is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised." Another reason given for the distinction is that "the tax is not levied, and, indeed, such a tax cannot be, until the expiration of each half year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a state to tax the fruits of such transportation, after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. Brown v. Maryland, 12 Wheat. 419."

The distinction between that case, which is mainly relied upon by the supreme court of Michigan in support of its decree, and the one which we now have before us, is very obvious and is two-fold: First. The corporation which was the subject of that taxation was a Pennsylvania corporation having the situs of its business within the state which created it and endowed it with its franchises. Upon these franchises, thus conferred by the state, it was asserted the state had a right to levy a tax. Second This tax was levied upon money in the treasury of the corporation, upon property within the limits of the state,

which had passed beyond the stage of compensation for freight, and had become, like any other property or money, liable to taxation by the state. The case before us has neither of these qualities. The corporation upon which this tax is levied, is not a corporation of the state of Michigan, and has never been organized or acknowledged as a corporation of that state. The money which it received for freight carried within the state probably never was within the state, being paid to the company either at the beginning or the end of its route, and certainly at the time the tax was levied it was neither money nor property of the corporation within the state of Michigan.

The proposition that the states can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way.

This is illustrated in the case of Cook v. Pennsylvania, 97 U. S. 566. The state of Pennsylvania, by her laws, had laid a tax upon the amount of sales of goods made by auctioneers, and had so modified and amended this class of taxes that in the end it remained a discriminating tax upon goods so sold imported from abroad. This court held that the tax which the auctioneer was required to pay into the treasury was a tax upon the goods sold, and, as this tax was three-quarters of 1 per cent. upon foreign drugs, glass, earthenware, hides, marble-work, and dye-woods, that it was a tax upon the goods so described for the privilege of selling them at auction. The argument was made that this was a tax exclusively upon the business of the auctioneer, which the state had a right to levy. In that case, as in others, it was claimed that the privilege of being an auctioneer, derived from the state by license, was subject to such taxation as the state chose to impose; but the proposition was overruled, and this court held that the tax was a regulation of commerce with foreign nations, and that the fact that it was a tax upon the business of an auctioneer did not relieve it from the objection arising from the constitutional provision.

The same question arose in the case of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826. That company was a corporation chartered by the state of New Jersey to run a ferry carrying passengers and freight between the town of Gloucester, in that state, and the city of Philadelphia, in the state of Pennsylvania. It had no property within the state of Pennsylvania, but it leased a landing-place or wharf in that city for its business. The auditor general and treasurer of the state of Pennsylvania assessed a tax upon the capital stock of this corporation under the laws of that state, which the company refused to pay. Its validity was sustained by the state supreme court, and the question was brought to this court by a writ of error. It was insisted that the tax was justified as a tax upon the business of the corporation, which, it was claimed, was largely transacted in the city of Philadelphia. The supreme court of the state, in giving its decision, stated that the single question presented for consideration was whether the company did business within the state of Pennsylvania within the period for which the taxes were imposed; and it held that it did, because it received and landed passengers and freight at its wharf in the city of Philadelphia. The argument was very much urged in this court that the licensing of ferries across navigable rivers, whether dividing two states or otherwise, had always been within the control of the states; and that this, being a mere tax upon the business of that corporation carried on largely within the state of Pennsylvania, was within the power of that state to regulate. But this court held, after an extensive review of the previous cases, that the business of ferrying across a navigable stream between two states was necessarily commerce among the states, and could not be taxed, as was attempted in that case.

In the case of Pickard v. Pullman Southern Car Co., 117 U. S. 34, 6 Sup. Ct. 635 (decided at the last term of the court), it was shown that the legislature of Tennessee had imposed what it called a privilege tax, under the constitution of that state, of $50 per annum upon every sleeping car or coach run or used upon a railroad in that state, not owned by the railroad company so running or using it. This, it will be perceived, is very much like the tax in the case before us, except that it is a specific tax of $50 per annum upon the car, instead of a tax upon the gross receipts arising from the use of the car by its owner. In that case, after an exhaustive review of the previous decisions in this class of cases by Mr. Justice Blatchford, who delivered the opinion of the court, it was held that, as these cars were not property located within the state, it was a tax for the privilege of carrying passengers in that class of cars through the state, which was interstate commerce, and for that reason the tax could not be sustained.

Two cases have been decided at the present term of the court in which these questions have been considered; one of them at least

involving the subject now under consideration, namely, that of Robbins v. Taxing District Shelby Co., 7 Sup. Ct. 592. A statute of that state declared that "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of ten dollars per week, or twenty-five dollars per month, for such privilege." Robbins was prosecuted for a violation of this law, and on the trial it appeared that he was a resident and a citizen of Cincinnati, Ohio, who transacted the business of drumming in the taxing district of Shelby county, that is, soliciting trade by the use of samples, for the firm by which he was employed, whose place of business was in Cincinnati, and all the members of which were residents and citizens of that city. It was argued in that case, as in the others we have just considered, that the state had a right to tax the business of selling by samples goods to be afterwards delivered, and to impose a tax upon the persons called drummers engaged in that business. It was further insisted that, since the license tax applied to persons residing within the state as well as to those who might come from other states to engage in that business, that it was not a tax discriminating against other states, or the products of other states, and was valid as a tax upon that class of business done within the state. The whole subject is reconsidered again in this case by Mr. Justice Bradley, who delivered the opinion of the court, in which it is held that the business in which Robbins was engaged, namely, that of selling goods by sample, which were in the state of Ohio at the time, and were to be delivered in the city of Memphis, Tennessee, constituted interstate commerce, and that, so far as this tax was to be imposed upon Robbins for doing that kind of business, it was a tax upon interstate commerce, and therefore not within the power of the state to enforce.

In the case of Wabash Ry. Co. v. Illinois, 118 U. S. 558, 7 Sup. Ct. 4, the question presented related to a statutory regulation of that state as to compensation for carrying freight. It was held by the supreme court of Illinois to embrace all contracts for transportation by railroad which came into or went out of the state, as well as that which was wholly within its limits; and, although the controversy did not arise in regard to a tax upon interstate commerce, yet the general question was fully considered as to what was interstate commerce, and what was commerce exclusively within the state, and how far the former could be thus regulated by a statute of a state. This court held in that case that no statute of a state in regard to the transportation of goods over railroads within its borders, which was a part of a continuous voyage to or from points outside of that state, and thus properly interstate commerce, could regulate the compensation to be paid for such transportation; that the carriage of passengers or freight between different points is commerce, and, except where that is wholly and exclusively within the limits of a state, it is not subject in its material features to be regulated by the state legislature.

In many other cases,—indeed, in the last three cases mentioned,—the whole subject has been fully examined and considered with all the authorities, and especially decisions of this court relating thereto. The result is so clearly against the statute of Michigan, as applied by its supreme court, that we think the judgment of that court cannot stand. The decree of the supreme court of Michigan is reversed, with directions for further proceedings in accordance with this opinion.

Injunction. Motion to dissolve on bill and answer. Buying up control of another road. Consolidation. Preventing competition. Dissentient stockholder. Purchase of shares to sue on. Power of majority.

ELKINS v. CAMDEN & ATLANTIC R. R. CO.

(36 N. J. Eq. 5, 9 Am. & Eng. R. R. Cases, 590.)

Court of Chancery of New Jersey, October Term, 1882.

Bill for injunction. On motion to dissolve the injunction on bill and answer.

P. L. Voorhees and B. Williamson, for the motion. D. J. Pancoast, S. H. Grey, and T. N. McCarter, contra.

RUNYON, Ch. The bill is filed by William L. Elkins, a stockholder of the Camden & Atlantic Railroad Company, on behalf of himself and the other stockholders, against the company to restrain it from entering into or executing any agreement with the Philadelphia & Atlantic City Railway Company, for the purchase by the former of the railroad of the latter company, and from entering into or executing any agreement with William Massey for the purchase by it of his interest in the latter company, for the purpose of getting control of the road of that company, and from entering into or executing any agreement with any corporation or corporations, person or persons, for the purchase by it of any of the property or stock of the latter company for any purpose not necessary for the proper operation of its own road. The bill states that it is the purpose of the defendant, and its board of directors, in its name and with its funds, either to purchase of the Philadelphia & Atlantic City Railway Company its railroad, which runs, as does that of the defendant, from the city of Camden to Atlantic City, for a very large sum of money, or to purchase of William Massey, who, it alleges, is the owner of the greater part of the stock and property of that company, his interest therein, for the sum of $500,000 over and above certain debts and liabilities of that company, estimated to amount to $200,000, to be assumed and paid by the defendant as a part of the consideration of the purchase; that the terms of the agreement to make the purchase of Massey had already, when the bill was filed, been agreed upon between him and the president of the defendant, and that at a meeting of the board of directors of the defendant, held in Camden on the 29th of May last, a resolution was passed in favor of the execution of the agreement to purchase from Massey his interest for the before-mentioned consideration. The bill further states that it is the design of the president and board of directors of the defendant to purchase, with the funds, and in the name of the defendant, either the entire property of the Philadelphia & Atlantic City Railway Company, or a controlling interest therein, with a view of uniting the property, business and management of that company with those of the defendant; and it charges that the scheme is foreign to the object and purposes of the defendant, beyond its powers, unlawful in its character and against the best interests of its stockholders, and that, if executed, it will result in irreparable injury to the complainant and the other stockholders of the defendant. On the filing of the bill an injunction was issued pursuant to the prayer thereof. The defendant has answered, and now, on the bill and answer, moves to dissolve the injunction. The answer, while it denies that the agreement referred to in the bill is as therein stated, admits that an agreement has been made between the president of the defendant, on its behalf, and Massey, for the sale by the latter to the defendant for the consideration of $500,000, to be paid in the defendant's first mortgage bonds, of his stock, bonds and other claims of and against the Philadelphia & Atlantic City Railway Company, and certain rolling stock of his. The following is the property bargained for:

First mortgage bonds	$224,000 00	
Interest unpaid to July 1st, 1882, inclusive	74 560 00	$294,560 00
First mortgage bonds held as collateral security	$ 70,400 00	
Interest unpaid to July 1st, 1882, inclusive	27,104 00	97,504 00
Floating debt	$236,344 10	
Less bonds held as collateral	70,400 00	165,944 10
Interest on the same to July 1st, 1882, about		27,500 00
Twenty-six hundred shares of stock		130,000 00
Nine locomotives and twenty-seven cars		109,299 47
		$824,807 57

The agreement, according to the answer, was by its terms to be of no effect, unless first submitted to and approved by the defendant's board of directors, and then ratified by its stockholders. There was also a provision for the purchase of the property by the defendant's president, for himself, or such of the defendant's stockholders as might associate themselves with him or them, in case of the directors or stockholders neglecting or refusing to approve of the agreement. That, however, is of no importance in the decision of the question under consideration. The agreement was made on the 26th of May last, and was to be carried out on the 1st of July following. The answer avers that so far from being an injury to the complainant and the other stockholders of the defendant, the execution of the agreement would be greatly to their advantage, and it avers also that it would be greatly to their advantage if by purchase, lease, uniting or consolidating with the Philadelphia & Atlantic City Railway Company, the defendant could have the management and operation of the railway of that

company, and use and operate it as a branch or lateral road. The latter road is a rival road. It is a narrow-gauge road, while the defendant's is of the ordinary gauge. The Philadelphia & Atlantic City Railway Company is insolvent, proceedings for foreclosure and sale of its road under the mortgage (for $500,000) thereon being now in progress in this court, and the road is now, by leave of this court, in the hands of, and operated by, the trustees for the bondholders under that mortgage. It appears, by the answer, that the defendant's board of directors have approved of the agreement in question, and that they do not intend to take any steps to carry it out, unless ratified by the stockholders. But though the answer avers that it is not the intention of the president and directors to act in the matter without the full consent, approval and direction of the stockholders, it must be understood that it does not mean to say that they will not act without the consent of all the stockholders, for otherwise the filing of the bill by the complainant, a dissentient stockholder, would have put an end to the matter, at least until his consent should have been obtained. What it means, undoubtedly, is that they will not act without the consent of the holders of a majority of the stock.

It is quite clear that unless the purchase in question can be sustained as a union or consolidation of the defendant with the other company, it cannot be sustained at all. On its face it is merely the purchase by the defendant, as a speculation, of stock and bonds, and floating debt of an insolvent corporation, together with rolling stock which it cannot use on its own road. In that view it is so obviously foreign to the objects for which the defendant was incorporated, so utterly unauthorized by any law, and so clearly beyond its powers, that no attempt is made in the answer, nor was any made on the argument, to sustain it on that ground; but the effort was made to sustain it on the ground that it is, in effect and in fact, a union and consolidation with the rival company, or an acquisition of the road of that company, as a lateral road. And inasmuch as on its face the agreement is neither of those things, it was urged that the court should, if it appears that the proposed purchase is designed merely as means for such union and consolidation or acquisition, have regard to the object and purpose rather than to the means by which they are both effected. By the general railroad law (Revision, p. 930, § 17) and the act of 1880 (P. L. 1880, p. 231), power is given to railroad companies to lease their roads, or any part of them, to any other corporation or corporations of this or any other state, or to unite and consolidate as well as merge their stock, property and franchises and roads with those of any other company or companies of this or any other state, or to do both; and it is provided that after such lease or consolidation the company acquiring the other's road may use and operate such road, and its own roads, or any of them. The purchase in question here has no reference to the acquisition of the narrow-gauge road by lease. But it is, as before stated, claimed that it is designed to enable the defendant to acquire the control and use of that road. That design is not directly avowed in the answer. It is charged in the bill, however, and is not denied in the answer, and it is a fair inference from the latter, that such and no other is the design. The object is to obtain ownership of so great a part of the stock, indebtedness and property of the narrow-gauge company, as to enable the defendant by means thereof to become the purchaser of its property at the foreclosure sale, or to have control of it after such sale in any re-organization of the company. But the acts of the legislature before referred to, while they give the defendant power to unite and consolidate with the other company, give it no power to purchase the debts of that company or its road, and it has no power to borrow money for either of those purposes. Union and consolidation of two railroad companies are one thing, and the purchase by one company of the property and franchises of the other, is another. What the defendant proposes to do is, not to unite and consolidate with the other company, but to purchase the means of controlling the property and franchises of that company, and for that purpose to borrow half a million dollars on mortgage of its own property and franchises. It has no power to borrow money for that purpose, and if it had the money in its treasury it would have no right to use it for that purpose. The purchase of a rival railroad is (not to speak of public policy) foreign to the objects for which the defendant was incorporated. Nor can the purchase be regarded as within the authority given by the defendant's charter to build lateral or branch roads. The charter authorizes the company to construct a railroad (the main line) from the city of Camden, or some point in the county of Camden within a mile of the city, to run to the sea at or near Absecon inlet in Atlantic county, and two branches from some convenient point in the main road, to be determined by the company, one to run to Batsto village in Burlington county, and the other to May's Landing in Atlantic county. P. L. 1852, p. 265. The narrow-gauge road runs, as before stated, from Camden to Atlantic City. Obviously, the acquisition of it cannot be regarded as authorized by a grant of power to build branches from the defendant's main line to Batsto and May's Landing. The transaction under consideration must be regarded as an agreement to buy stock and bonds, and unsecured debt of an insolvent corporation. As such, irrespective of the assumed ulterior object in the purchase, it is not even suggested that it is legitimate. It does not appear that the rolling stock included in the bargain, and valued therein at $109,000, is to be purchased for use on the defendant's road, but it is reasonable to conclude that it is not, seeing that

it is adapted to the narrow-gauge road, and therefore not to the defendant's. Moreover, it is apparent that the agreement is to be regarded as a whole, and is so regarded by the defendant. As a purchase with a view to extinguishing competition the transaction is clearly ultra vires. Colles v. Directory Co., 11 Hun, 397.

It is urged that to induce this court to interfere by injunction in such a case as this, it must appear that the complainant will, if it withholds its prohibition, sustain irreparable injury, and it is insisted that so far from being an injury to the stockholders the proposed purchase will be of very great advantage. It is also urged that the complainant is a mere volunteer; that he acquired his stock after the negotiations for the purchase in question were begun, and got it for the very purpose of defeating the project. To dispose of the latter objection: It appears that the complainant is a stockholder. If, in fact, he acquired his stock at the time and with the design alleged in the answer, that would not affect his right to the relief which he seeks. But those things appear only from the averments of the answer, and those averments are not responsive and are therefore no evidence, and if they were they are not verified. As to the former objection: The proceeding in question is, as before stated, strictly ultra vires. In such a case equity will give such appropriate relief as may be practicable against the illegal act, and that, too, at the suit of a single stockholder; while on the other hand, it will not interfere in a matter involving no breach of trust but only error of judgment on the part of the representatives of the company, even though such error may eventuate in the injury of the stockholders. Potter, Corp. 130–132; High, Inj. § 767; Boone, Corp. §§ 148, 149; Kean v. Johnson, 9 N. J. Eq. 401; Gifford v. Railroad Co., 10 N. J. Eq. 171; Beman v. Rufford, 6 Eng. Law & Eq. 106; Grant, Corp. 290; Zabriskie v. Railroad Co., 18 N. J. Eq. 178; Black v. Canal Co., 24 N. J. Eq. 455. In a recent case (Hawes v. Water Co., 21 Am. Law Reg. [N. S.] 252) the supreme court of the United States, in laying down the principles governing the class of cases in which a stockholder of a corporation may maintain a suit in equity in his own name, founded on a right of action existing in the corporation itself, and in which it is the appropriate complainant, recognized the following grounds: Where some action is taken or threatened by the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by the charter or other source of organization; or where there is such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other stockholders, as will result in serious injury to the corporation or to the interests of the other stockholders; or where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other stockholders; or where the majority of the stockholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other stockholders, and which can only be restrained by the aid of a court of equity. And the court adds that possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers. In the case in hand, the illegal agreement has been made, in behalf of the company, by its president, subject to the approval of the directors and stockholders. The directors have already approved of it. It is true they have provided by resolution for the calling of a special meeting of the stockholders to pass upon it; but the voice of such a meeting could not authorize the project if it be beyond the powers of the corporation. It is enough to warrant the interference of this court to know that it is the admitted intention of the board to execute the illegal agreement, provided the holders of a majority of the stock are favorable to it. The motion to dissolve is denied, with costs.

Mortgage bonds. Presumption of validity. Conflict of laws. Future acquired personalty. Recording. Lease of foreign road. Replevin. Comity.

NICHOLS v. MASE.

(94 N. Y. 160.)

Court of Appeals of New York. Nov. 27, 1883.

Action by the trustee under a mortgage to recover property seized on attachment. There was a judgment for plaintiff. Defendant appealed. Modified.

Homer A. Nelson, for appellant. R. F. Wilkinson, for respondent.

MILLER, J. The plaintiff, as treasurer of the state of Connecticut, and as trustee for the holders of certain mortgage bonds of the Connecticut Western Railroad Company, brought this action to recover certain personal property, and a lease in possession of the defendant, as sheriff of the county of Dutchess. He claims possession under a mortgage executed by the railroad company to the treasurer of the state of Connecticut.

The defendant was in possession under an attachment issued from the supreme court against the property of the company.

The mortgage executed by the Connecticut Western Railroad Company to the state treasurer of Connecticut, by its terms covered all the lands, railways, etc., and all the personal property then belonging, or which might thereafter belong, to the company, and all rights and franchises of the company under its charter, and was executed in trust for the benefit of the holders of the bonds of the company referred to in the mortgage. It provided that if the interest remained at any time unpaid for six months after the presentation of the proper coupons, the principal should become due. It also provided that the company should remain in possession until default should be made in the payment of interest, and that in case the interest should remain unpaid for six months the mortgagee might, at the request of the holders of one-third the amount of the bonds, take possession of the railroad and all its property, franchises, etc., and through agents appointed by him, operate the railroad, and receive the income and profits thereof. The sheriff levied upon the property under an execution issued upon a judgment against the company on the 19th day of March, 1880. On the 27th day of April, 1880, the property was formally surrendered to the trustee named in the mortgage, in consequence of a failure to pay the interest due upon the bonds which the mortgage was given to secure. If the mortgage in question was valid within this state, there can be no doubt as to the right of the plaintiff to maintain this action, upon proof of a demand and a refusal to deliver.

The objection urged against the validity of the mortgage, upon the ground that it was not executed in accordance with the laws of the state of Connecticut, are without merit. There is no ground for the claim that the bonds were not issued in accordance with the charter, and that they were issued without regard to the amount expended, and the sworn statement of the engineer. There was no proof on the trial that there was any failure in this respect, and the bonds being valid upon their face, the plaintiff was not bound to prove that these provisions of the law were complied with. The burden was upon the defendant, as the case stood, to show the invalidity of the bonds.

The law required the comptroller to issue the bonds in accordance with the provisions of the charter, and in the absence of evidence to the contrary, the presumption is that he performed his duty. The objection that the mortgage was not attested by two witnesses, according to the statute of the state of Connecticut, has no force. Witnesses were not necessary to a mortgage executed by a corporation according to the laws of that state. Section 511 of the statute of Connecticut, entitled "an act concerning communities and corporations," prescribes that mortgages executed by railroad corporations shall be authenticated by deed executed by the president, under the corporate seal. This provision was complied with in the mortgage in question, and the statute cited is controlling, as it embraces a mortgage of this character. The general statute does not impair the effect of this special statute cited, as it is not manifest that such was the intention of the legislature. The signature of the president and the seal of the corporation show a due execution of the mortgage in accordance with the law.

Even if there were defects in the execution of the bonds and the mortgage, we think these were cured by the statutes of Connecticut, relating to that subject, which were introduced in evidence on the trial. As however we have arrived at the conclusion that the mortgage was properly authenticated, and the bonds properly issued, as the law required, we do not deem it necessary to consider the effect of the remedial statutes referred to.

It is contended by the appellant's counsel that, assuming the validity of the mortgage under which the plaintiff claims title, the plaintiff was not entitled to recover, and it is urged in support of this position, that the treasurer of Connecticut never had possession of the property in suit, and that he was only entitled to possession under the terms of the mortgage, which had not been complied with. This objection has reference to the performance of the conditions precedent, contained in the mortgage, which, it is claimed, only entitled the plaintiff to take possession. We think that the evidence shows such a compliance with the terms of the mortgage in this respect as authorized the treasurer of the state to take possession of the property, but we do not deem it necessary to enter upon an examination of the

evidence which established the right to take possession. The conditions in this respect were for the benefit of the railroad company, and it having surrendered the property voluntarily, there was a waiver of the same. The corporation having a clear right thus to waive the conditions referred to, and the defendant being a mere trespasser, he is in no position to insist that the terms of the mortgage have not been fulfilled.

The right to renounce a condition in favor of a party to be benefited by its terms is well settled in law, and the claim of one who is a stranger, and who has no connection with, or right to enforce the same, has no foundation to support it. We think that all the property in question was covered by the mortgage, which by its terms includes the railroad stock and all the personal property used in the operation of the railroad, and the appurtenances thereto. Its language includes the property acquired after the execution of the mortgage. Such, evidently, was the intention of the mortgagor in giving, and the mortgagee in taking, security on the property, and there is no ground for claiming to the contrary. Even if there was, there is no proof that the property in question was acquired subsequent to the execution of the mortgage. As every presumption is in a different direction the burden of proof in this respect is upon the defendant.

The question is also raised that the mortgage, even if valid in the state of Connecticut, was not valid in this state, for the reason that it was not filed or recorded here in accordance with the statute applicable to mortgages on personal property. By chapter 279 of Laws of 1833, of this state, mortgages on personal property, when not accompanied by a change of possession, were declared to be absolutely void as against the creditors of the mortgagor, unless the mortgage, or a true copy thereof, was filed as provided by the statute. The act further provided for the filing of the mortgage in the town or city where the mortgagor resided, and if the mortgagor was not a resident, then in the city or town where the property so mortgaged was at the time of the execution of the instrument. By the act of 1868 (chapter 779), it is declared that it shall not be necessary to file a mortgage upon real and personal property, executed by a railroad company, which has been recorded as a mortgage of real estate. Under these statutes the filing or the recording of the mortgage in question would have been necessary in order to render it valid and effectual if it had been made in this state, but they do not apply, and cannot affect the same, as it was properly executed, and was valid according to the laws of the state of Connecticut. The mortgage was effectual in that state. It was not proved that the mortgaged property was in this state at the time of the execution of the mortgage, and it must be assumed to have been in the state of Connecticut. The validity of the mortgage, therefore, must depend upon the rules of law which are applicable to a transaction of this character. The mortgage being valid in the state of Connecticut, where the property was at the time of the execution, and where the parties entered into the contract, it is a protection to the mortgagee in his right to the property included in it, which may have been brought into the state of New York. In this state it is held that where a contract in regard to personal property is made in another state, that the law of such state as to its validity and effect is to govern here, and if valid there it is to be considered equally valid, and can be enforced here. Insurance Co. v. Aldrich, 26 N. Y. 96. So, also, where a lien is valid in this state, and the property is temporarily removed to another state, a creditor cannot defeat the interest acquired under the same by proceedings in invitum in another state. Martin v. Hill, 12 Barb. 631. The rule last stated is also recognized by the decisions in other states. See Langworthy v. Little, 12 Cush. 109; Jones v. Taylor, 30 Vt. 42; Ferguson v. Clifford, 37 N. H. 86. The principle is also well settled that a voluntary conveyance of personal property, good by the law of the place where it was made, passes title wheresoever the property may be situated. Hoyt v. Thompson, 19 N. Y. 224. The true rule is laid down in Edgerly v. Bush, 81 N. Y. 203, by Folger, C. J., as follows: "The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him."

It being clear, as we have seen, that the mortgage was valid in Connecticut, under the rule already stated, it was valid in this state, and the plaintiff had an unquestionable right to the property covered by the same. By the rule of comity which prevails between the different states, the right of the plaintiff to the property in question was entitled to protection, and the policy of this state has been to protect the right of ownership, and to leave the buyer to take care that he gets a good title. See 81 N. Y. 199, supra. The application of this rule rests in sound judicial discretion, dictated by the circumstances of the case, and, in view of the authorities already cited, a proper case was presented for the exercise of such discretion. It cannot be fairly contended that the laws of the state of Connecticut in reference to the rights of the plaintiff are in contravention of the policy and the laws of this state, and that it would be injurious to the citizens of this state to give them effect here. The rule of comity to which we have referred must stand and control in this case, as it is fully established by the decisions of the courts; any other or different rule would not furnish that protection to the interest of citizens of other states which is demanded

in their intercourse and business connections with the people of the state of New York.

We think the court erred in allowing the plaintiff to recover the lease of part of the Newburgh, Dutchess and Columbia Railroad. The lease, of itself, was not the subject of replevin.

There was also error in directing the jury to assess the value of the property taken at $15,000, as that included the value of the lease in question, and also the undivided one-half interest in land at the junction of the Dutchess and Harlem Railroad, in all to the value of $1,200. In this respect the judgment should be modified by deducting the last-named amount from the damages, and five per cent. extra allowance on the same from the costs, otherwise the judgment should be affirmed, without costs of appeal to either party.

All concur. Judgment accordingly.

Mortgage of future income. Accounting. Date of accountability. Going concern.

DOW et al. v. MEMPHIS & LITTLE ROCK R. R. CO.

(124 U. S. 652, 8 Sup. Ct. 673.)

Supreme Court of the United States. Feb. 20, 1888.

Appeal from the circuit court of the United States for the Eastern district of Arkansas.

U. M. Rose, for appellants. Wager Swayne, for appellees.

WAITE, C. J. The facts on which this case rests are these: Robert K. Dow, Watson Matthews, and Charles Moran are the trustees in two mortgages executed by the Memphis & Little Rock Railroad Company, as reorganized, one on the first and the other on the second of May, 1877, to secure two separate issues of bonds. Each of the mortgages covered, among other things, "all the incomes, rents, issues, tolls, profits, receipts, rights, benefits, and advantages had, received, or derived by the party of the first part from any of the hereby conveyed premises," which included the railroad of the company; but it was provided that until default in the payment of interest or principal the company should "retain the possession of all the property hereby conveyed, and receive and enjoy the income thereof." In case of default for 60 days in the payment of interest, the trustees were authorized to enter upon and take possession of "all and singular the charter, franchises, and property * * * conveyed," "and take and receive the income and profits thereof." The company failed to pay its interest falling due July 1, 1882, and thereafter. For this reason the trustees began this suit against the company in the circuit of the United States on the 12th of February, 1884, praying that they might be put into the possession of the mortgaged property in accordance with the terms of the mortgage of May 2, 1877, and for the purposes therein expressed, "and that the defendant may be enjoined from interfering with their possession, or disturbing it in any way." On the 24th of March they applied for the appointment of a receiver, and the court, on the 27th of that month, granted the parties until April 7th to file briefs on the motion, but ordered "that the defendant, until further order herein, hold the property mentioned in the bill subject to the order of the court." On the 15th of April a receiver was appointed, and the company was ordered at once to "surrender possession of its said railroad, rolling stock, and all other money and property of every character" to him. To this order exceptions were taken by the company, so far as it directed the delivery of money to the receiver, on the ground "that all the money in its hands or possession was derived by it from the operation of the railroad and other property mentioned in the bill, and was its income and the income of said property, and that it had no money whatever, save such as was thus derived and received;" and that at no time had the plaintiff demanded possession of the property. On the 18th of April this motion was denied, but the receiver was directed to hold the moneys to be paid him "subject to the order of the court, and to be repaid to defendant should the court so adjudge." On the 27th of March the company had in its hands $42,123.68. Between that date and April 15th the company paid out $46,458.16, and its earnings were such that, when added to the $42,123.68, there was enough to make these payments and leave a balance of $32,216.20, which was paid over to the receiver.

Certain persons who were holders of bonds secured by the mortgage of May 1, 1877, recovered judgments at law against the company for past-due coupons, amounting in the aggregate to more than the sum thus put in the hands of the receiver, and they presented petitions for payment out of the fund. Afterwards the court ordered the receiver to pay back the $32,216.20 to the company, and to turn over the mortgaged property to the trustees. The record does not show that there are any other creditors than such as are secured by the mortgages, which exceed in amount the value of the property. From that part of the decree directing the restoration of the money to the company, the trustees took this appeal. The creditors who presented petitions for the payment of their judgments did not appeal, so that the only question presented here is whether the court erred in ordering the receiver to pay the $32,216.20 to the company instead of the trustees.

It is well settled that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in Railroad v. Cowdrey, 11 Wall. 459, 483. In the present case a demand was made for the possession by the bringing of this suit, February 12, 1884, and from that time, in our opinion, the company must account. The bill was not filed to foreclose the mortgage, but to enforce a surrender of possession to the trustees in accordance with its terms. The court below decided that the trustees were entitled to the possession when the suit was begun, and from the decree to that effect no appeal has been prosecuted. We must assume, therefore, that the demand was rightfully made, and ought to have been granted. It follows that after the suit was begun the company wrongfully withheld the possession, and under such circumstances equity forbids that it should retain, as against the mortgagee, the fruits of its refusal to do what it ought to have done. It is a matter of no consequence that a receiver was not appointed until April 15th, or that an appli-

cation was not made for such an appointment until March 24th. If the surrender of possession had been made, as we must assume it ought to have been, as soon as the suit was begun, a receiver would have been unnecessary. All that was done afterwards in that particular was in aid of the suit and because of the refusal of the company to comply with the demand that had been made. It follows that from the time of the bringing of the suit the company itself is to be treated in all respects as a receiver of the property, holding for the benefit of whomsoever in the end it should be found to concern, and liable to account accordingly. In Railroad v. Cowdrey, before cited, the controversy was in respect to earnings before suit brought, and the suit was for foreclosure only, the court being careful to say, in its opinion, that it did not "appear that the complainants, or their trustees, made any demand for the tolls and income until they filed the present bill," and that "the bill itself did not contain any allegation of such a demand."

It remains only to inquire when the money, which is the subject-matter of the controversy, was actually earned, and we have no hesitation in deciding, upon the evidence, that it must have been after the suit was begun. The admission is that on the 27th of March the amount in the hands of the company was $42,123.68. Between that date and April 15th the company paid out $46,458.16, which was $4,334.48 in excess of what it had on hand at the beginning. On the 15th of April it had on hand $32,216.20, thus showing that its earnings from March 27th until then must have been $36,550.68. The fair inference from the evidence is that the receipts were all from the current earnings, and the disbursements for the current expenses. The railroad was all the time, before and after the suit, a "going concern," and its receipts and disbursements the subjects of current income account. Applying the disbursements as they were made from the income to the payment of the older liabilities for the expenses, as is the rule in ordinary running accounts, it is clear that, in the absence of proof to the contrary, the money on hand was earned pending the suit. Under these circumstances, as there are no current expense creditors claiming the fund, we are satisfied that the money is to be treated as income covered by the mortgages, and should be paid to the trustees, to be held as part of that security.

The decree of the circuit court is reversed, and the cause remanded, with instructions to enter a decree in accordance with this opinion.

Mortgage may cover supplies, coal, etc. Does, if language is sufficiently general as to future acquired property. Levy by creditor on coal bought after mortgage given, and before mortgagees take possession. Injunction.

PHILLIPS v. WINSLOW et al.

WOODWARD et al. v. SAME.

(18 B. Mon. 431, 68 Am. Dec. 729.)

Court of Appeals of Kentucky. 1857.

Appeal from circuit court, Kenton county.

Benton & Nixon and Menzies & Pryor, for appellee.

SIMPSON, J. These actions in equity were brought by Winslow as trustee. His title to the property in contest is derived under two deeds executed to him by the Covington and Lexington Railroad Company, one bearing date the 8th of April, 1853, and the other the 1st day of June, 1855. The deeds were executed to enable the corporation to borrow money. They both purport to convey to the trustee, to secure the payment of the money borrowed "all the present and in future to be acquired property of the parties of the first part; that is to say, their road made or to be made, including the right of way and land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials used therein, or procured therefor, and engines, tenders, cars, tools, materials, machinery, contracts, and all other personal property, right thereto, or interest therein, together with the tolls, rents, or income to be had or levied thereupon, and all franchises, rights, and privileges of the said parties of the first part of, in, to, or concerning the same."

The corporation had made a previous deed on the same property, in precisely the same language, to John A. Stevens and Charles N. Fearing, to secure the payment of the bonds of the company to the amount of four hundred thousand dollars. The grantees in this first deed, therefore, were invested with the legal title to the property embraced in the deeds.

The defendants in the action, being judgment creditors of the corporation, sued out their respective executions, and caused them to be levied on two freight cars of the company, then on the track, eight car wheels at the car shop, twenty-five cords of fire wood obtained for the use of the engines and locomotives, and five hundred bushels of stone coal at the machine shop. The proceedings under Woodward's execution were enjoined before a sale was made by the officer, but the property was sold under the execution in favor of Phillips and Jordan, &c, and was purchased by them. Its removal was enjoined in the action in which they were defendants, and the injunctions in both cases were sustained and perpetuated by the judgment of the court below on final hearing.

The first and most important question that arises in these cases is, do the deeds to the plaintiff include the property upon which the executions of the defendants were levied? If they do not, he has no right or title to the property, and cannot maintain his actions, even although the property was not subject either to levy or sale.

The plaintiff did not allege in his petition in either case, that the property belonged to the railroad company at the time the deeds were executed. It may therefore be assumed that it has been subsequently acquired by it.

The company, by its charter, was authorized to borrow money, and execute such evidences of indebtedness as might be deemed proper, and pledge the property, franchises, rights and credits of the corporation for any loan, liability, or contract which it had made or should make.

We do not deem it necessary to decide in this case whether, under ordinary circumstances, a mortgage on subsequently acquired property would be valid, or pass any title to the property. These deeds were made under the power conferred by the charter, and their validity and effect have to be determined by the provisions of the charter, and not by the general law upon the subject. The object in conferring this power on the corporation was to enable it to borrow money for the purpose of constructing the road, and putting it into full and complete operation. The power to pledge the franchises and rights of the corporation implies, as incident thereto, the power to pledge everything that may be necessary to the enjoyment of the franchise, and upon which its real value depends. It could not have been intended by the legislature merely to confer a power to pledge the naked franchise, which belonged to the corporation, without the right also to pledge such things as were incident and indispensable to its use and enjoyment, and without which it would be of no value whatever. A power of such limited operation would have been of no avail, in the then condition of the road, and would not have accomplished the object contemplated by the legislature and the company. The corporation was authorized to pledge not only the existing property of the road, but the corporate rights and franchises, and the railroad itself, as an entire thing. To render such a pledge effectual, it was necessary that it should embrace all such future acquisitions of the corporation as were proper accessions to the thing pledged, and essential to its enjoyment, and the power thus to extend it was implied in the grant itself. Of what value would the railroad be without the cars on the road, and the fuel necessary to run them? The bonds of the company were redeemable in thirty years. To secure their payment, the road of the company made and completed, including the right of way and the land occupied thereby, with the superstructure and track thereon, and all the rails and other materials used and to be used therein, and all engines, cars, tools, machinery, and all other personal property then owned, or which might be afterwards ac-

quired by the company, together with all franchises, rights, and privileges of the company to use the road and collect tolls and freight, were conveyed in pledge by the company. Now, it is evident that as the pledge was to continue during many years, new cars and engines and materials of different description would from time to time become necessary, and fuel would all the time have to be purchased as it was needed. These articles were therefore included in the deed, and as the business of the road could not be carried on without them, the power to pledge and the road itself, with its profits and privileges, and the rights and franchises of the corporation, carried along with it the implied authority to pledge all such future acquisitions of the company as were necessary and proper to the full and complete use and operation of the road itself.

We are therefore of the opinion that the property upon which the executions were levied was embraced by the deeds to the plaintiff, whether it belonged to the company at the time the deeds were executed, or was subsequently purchased by it.

The next question to be considered is the jurisdiction of a court of equity in these cases, and its power to grant relief by enjoining the defendants from proceeding to dispose of the property under their executions. It is contended that they had a right to levy their executions on the equity of redemption, and to make sale thereof, and that for any wrong committed by them the plaintiff had an adequate remedy at law.

The plaintiff's right to the property was merely equitable, inasmuch as it was covered by an elder deed of trust than those under which he claimed. Consequently, before the adoption of the Code of Practice, he could not have maintained an action at law against the defendants, but would have been compelled to resort to a court of chancery for relief; and under the Code, a plaintiff may prosecute his action by equitable proceedings, in all cases where courts of chancery before its adoption had jurisdiction. Code Prac. § 4.

In one of these cases the property had been sold and purchased by the plaintiffs in the execution. In making the sale, the deeds of trust had been disregarded, and the absolute right to the property, and not merely the equity of redemption therein, was sold by the officer. By this act, the levy itself became tortious by relation, and the sale was illegal. If the plaintiff had been invested with the legal title to the property, he could have maintained an action of replevin or detinue against the purchaser for its recovery. Fugate v. Clarkson, 2 B. Mon. 42. As he only had an equitable title to it, he had a clear right to apply to a court of equity for relief, and was entitled to a judgment for a re-delivery of the property, if it had been taken into possession by the defendants, or to an order restraining them from a removal of it, if it had not been removed by them.

In the other case the property had not been sold, but the plaintiff alleged that the defendant had levied an execution upon it, and would sell it, unless restrained by the chancellor. As the plaintiff had a right to come into a court of equity for relief, on the ground that he had only an equitable right to the property, and as the defendant, according to the allegations contained in the petition, was about to commit an illegal act, the court had the power to restrain him, and thereby prevent its commission. A court of law only affords relief, after the wrong has been done, but a court of equity will interpose, and prevent its commission, where it has jurisdiction of the case, and the act, if committed, would be evidently wrongful and illegal. The defendant did not propose to sell merely the equity of redemption, but to sell the property itself.

But we are of the opinion that in these cases, the court had jurisdiction, upon the ground, that the act complained of was not only in violation of the plaintiff's right, but it was of a character which might produce great or irreparable injury to the plaintiff, and great inconvenience to the public.

If executions can be levied upon one car they can be levied upon all the cars upon the road. If they can be levied upon part of the fuel, they can be levied upon all of it, and thus the business of the road may be entirely suspended. Such a result would not only produce great injury to the plaintiff, but great inconvenience to the public. It would prevent all travel upon the road, and effectually destroy its business and its usefulness. If the property was subject to execution, the plaintiff would have no right to complain, let the consequences be what they might; but not being subject to execution, he has a clear right to apply to the chancellor for an injunction to prevent an act which might be productive of so great an injury; the right to redeem the property, being a right that belongs to the corporation, is liable for its debts; but the defendants were not attempting to sell this equity of redemption, but the property itself, which they had no right to do.

Where encumbered property is sold under execution, courts of equity have the control of it, and the power to make all needful orders for its preservation. Since the adoption of the Revised Statutes, the purchaser, under a sale of the equity of redemption, only acquires a lien upon it, for the re-payment of the purchase money and interest. Rev. St. p. 327. If then one of the previous incumbrancers should be in the possession of the property, at the time of the sale of the equity of redemption, under the provisions of the deed creating the incumbrance, having a right under the same to apply the profits to the payment of his demand, a court of equity having the power to control the property would secure him in the possession and enjoyment of it, leaving to the purchaser the benefit of the lien he had acquired under the sale of the equity of redemption.

Here the plaintiff was substantially in the possession of the road through his agents, the officers of the company, or if not in the actual possession of it, he had the right to it by the terms of the deeds creating the incumbrance, and also the right to appropriate the profits of the road to the payment of the debts of his cestui que trusts. If therefore the defendants had sold merely the equity of redemption, or, in other words, had sold the property subject to the previous incumbrances, the chancellor would have had a right under the discretionary powers vested in him by the statute to have prevented its removal by the purchaser. But as the defendants had under one execution sold the property, without any regard to the incumbrances upon it, and were proceeding to do the same thing in the other case, the plaintiff had an undoubted right to the relief granted him by the judgment of the court below.

Wherefore, the judgments in both cases are affirmed.

Contra, Coe v. Knox County Bank, 10 Ohio St. 412.

Foreclosure suit. Money advanced to cash coupons. Priorities. Estoppel.

UNION TRUST CO. v. MONTICELLO & PORT JERVIS RAILWAY CO.

(63 N. Y. 311.)

Court of Appeals of New York. Nov. 30, 1875.

Action by the trustee to foreclose a mortgage securing bonds. Appeal by a holder of coupons from an order denying his right to share in the proceeds of the mortgaged property. Affirmed.

Daniel T. Walden, for appellant. Henry Day, for respondent.

EARL, J. The Monticello and Port Jervis Railway Company issued five hundred bonds of $1,000 each, with interest coupons attached, payable quarterly, on the first days of January, April, July and October, and it executed and delivered to the plaintiff a mortgage upon its property to secure the payment of the bonds and coupons. Default having been made by the railway company, the plaintiff commenced a foreclosure of the mortgage; and the premises mortgaged brought, on a sale under the decree, less than the amount of the face of the bonds. A reference was ordered in this action, to a referee, to ascertain, among other things, the holders of the bonds and coupons who were entitled to share in the proceeds. It appeared upon such reference that the railway company being unable to pay the coupons due July 1 and October 1, 1872, and January 1, 1873, one A. F. Smith made an agreement with its president to advance the money to pay the coupons due at the dates mentioned, and to hold the coupons for his security. In pursuance of this agreement, he went to the plaintiff, where the coupons were payable, and left with it the money to pay the coupons when presented, it agreeing with him to take and deliver them to him uncanceled, that he might hold them as his security for the money advanced. The holders who presented the coupons for payment generally knew nothing of this arrangement, and supposed when they received the money and delivered up the coupons that they were paid. Smith thus took up fifteen hundred coupons, five hundred at each of the dates mentioned, and now claims to share in the funds pro rata with the other holders of bonds and coupons. The referee disallowed his claim, and his decision was sustained both at special and general terms.

The coupons were secured by the mortgage, and their detachment from the bonds did not deprive the holders of them of the security of the mortgage. That remained security for their payment until paid, whether attached to or detached from the bonds. County of Beaver v. Armstrong, 44 Pa. St. 63; Miller v. Railroad Co., 40 Vt. 399; Haven v. Railroad Co., 109 Mass. 88. Here the holders of the coupons did not agree to assign or transfer them to Smith, and did not in fact do so. When they delivered these coupons to the trust company they supposed they were receiving payment of them, and Smith undoubtedly knew this. He however intended to take and hold them, and keep them in being as his security for the money advanced. This he could do as against the railway company; and as against it the mortgage could be enforced for his benefit. It had not paid the coupons, was in no way harmed by their payment by Smith, and he advanced the money for its benefit upon the request of its principal officer. But a different rule applies as between Smith and the bondholders. They had a direct interest in having the coupons paid, so as to preserve the value of their security. They delivered them up to the trust company for payment, and supposed they were paid. If they had known the true state of the case, they might and probably would have refused to assign the coupons, and to have them kept in life, and thus, by an accumulation of interest, to have impaired the value of their security. And they could have caused a foreclosure of the mortgage for default in the payment of the interest.

If the creditors who now contest Smith's claim had purchased their bonds in the belief that the coupons had actually been paid, there could be no question that Smith would be estopped as against them from claiming that he took a transfer of them, and that they were still secured by the mortgage (109 Mass., supra); and I cannot perceive why, upon the facts presented, their present position is not equally strong.

There are many cases where money is paid upon mortgages and judgments by persons not parties to them, in which, whether the security shall be regarded as extinguished, or held to be in force for the benefit of the party paying, depends upon the intent of the party paying. Equity will keep the securities in life in such cases to promote the ends of justice; but not against any person having a superior equity. Harbeck v. Vanderhilt, 20 N. Y. 398; Robinson v. Leavitt, 7 N. H. 100; Miller v. Railroad Co., supra; James v. Johnson, 6 Johns. Ch. 423; Haven v. Railroad Co., supra.

Here the bondholders did not agree that Smith should take and hold the coupons, and they did not agree that he should have any interest in the mortgage security. To give him the benefit of the security would now be detrimental to them, and as between them and him would be inequitable.

I am therefore of opinion that the case was properly disposed of, and that the order should be affirmed, with costs.

All concur. Order affirmed.

Bondholders are represented by mortgage trustees. Minority interest. Completing unfinished road by receivers. Fraud.

SHAW v. RAILROAD CO. (two cases).

(100 U. S. 605.)

Supreme Court of the United States. Oct., 1879.

Appeals from the circuit court of the United States for the Eastern district of Arkansas.

These cases present the following facts:

By an act approved Feb. 9, 1853 (10 Stat. 155), congress granted lands to the state of Arkansas to aid in building a railroad. Power was given the state to sell them only as the road was completed in sections of twenty miles each. If the road was not finished in a specified time, all lands not sold were to revert to the United States. A part of the lands thus donated by congress were granted by the state to the Little Rock and Fort Smith Railroad Company.

On the 22d of December, 1869, the railroad company executed a mortgage on its railroad, completed and to be completed, to Henry W. Paine and Samuel T. Dana, as trustees, to secure an issue of bonds amounting in the aggregate to $3,500,000, payable Jan. 1, 1890, with interest semi-annually at six per cent per annum, and on the 20th of June, 1870, it executed another mortgage on its land-grant, earned and to be earned, to Paine, Dana, and William B. Stevens, to secure another issue of bonds for $5,000,000, payable April 1, 1900, with interest semi-annually at seven per cent per annum. Each of the mortgages contained this clause:—

"In case default shall be made in the payment of any half-year's interest on any of the said bonds, at the time and in the manner in the coupon issued therewith provided, the said coupons having been presented and the payment of the interest therein specified having been demanded, and such default shall continue for the period of three months after said coupons shall have become due, and been demanded as aforesaid, then and thereupon the principal of all the said bonds shall, at the election of the trustees, become immediately due and payable."

On the 12th of May, 1874, all the bonds provided for in both these mortgages had been put out and one hundred miles of the road built. About sixty miles remained to be completed, and the company was without funds or credit. All interest on the bonds falling due Jan. 1, 1871, and thereafter, was in arrear and unpaid. Thereupon Paine, a citizen of Massachusetts, at that time the only trustee of the mortgage of the railroad, and Paine, Stevens, and Charles W. Huntington, all citizens of Massachusetts, then the trustees of the land-grant mortgage, commenced suits in the circuit court of the United States for the Eastern district of Arkansas to foreclose their respective mortgages. In each of the bills the necessary averments of fact were made to entitle the parties to a decree of sale, and the trustees elected to treat the principal of the bonds as due. All the necessary defendants, including certain judgment creditors were made, and there was nothing at that time in the citizenship of the parties to interfere with the jurisdiction of the court. The first of these cases is the suit upon the railroad mortgage, and the second that on the land grant. Afterwards changes in the trustees were made, so that Charles W. Huntington and Samuel H. Gookin represented the railroad mortgage, and Huntington, Gookin, and Samuel Atkins the land grant. The proper substitutions were made on the record, the new trustees all being citizens of Massachusetts.

Subsequently, on the 3d of October, 1874, an amendment was made to the bill for the foreclosure of the railroad mortgage, by which Atkins, one of the trustees of the land-grant mortgage, and other persons, citizens of Massachusetts, were brought in as defendants to that suit. The object of this amendment was to obtain the appointment of a receiver of the property with a view to raising money on receiver's certificates to complete the road and save the unearned land grant. No such appointment was made, however, and nothing was done under the amendment. On the 6th of November, a decree was entered in each of the cases, finding that the mortgage sued on was a valid and subsisting lien on the mortgaged property; that the whole amount of the bonds in each case had been issued, and, with the interest thereon, was due and unpaid; and ordering the mortgaged property to be sold unless the debt, principal and interest, was paid on or before the 10th of December then next. Provision was also made in each case for a distribution of the proceeds of the sales among the bondholders.

After this decree was rendered, a public meeting of the holders of both classes of bonds was called in Boston on full notice, and, as the result of that meeting, George O. Shattuck, Francis M. Weld, and George Ripley were appointed by parties representing in the aggregate $6,097,000 of the bonds, to purchase the mortgaged property for the benefit of the bondholders. They accordingly appeared at the sale, and became the purchasers of the railroad for $50,000, and the land grant for the same amount. The sale was duly reported to the court on the 19th of December, when the purchasers appeared and declared in open court, and desired to have it recorded, that it was their intention to organize a corporation under the laws of Arkansas, to own, hold, and manage the property bought at the sales, and that the holder of any of the bonds secured by either mortgage might, within sixty days from the time of the organization of the corporation, transfer to it his bonds and his right to the proceeds of the sale, and become entitled to his proportional interest in the stock of the new corporation upon the same terms and

stipulations as any other holder of the bonds; but this was not to prevent the new corporation from requiring from any and all bondholders the payment of his proportion of the expenses attending the sales and purchases, and such other sums not exceeding five per cent of the principal of the bonds as it might deem for its interests to require as a condition on which the stock should be delivered, provided that the same requirement should be made of all the other holders of bonds, and provided further. that this stipulation should not limit the power of the purchasers to organize the corporation without notice, or of the corporation so organized to mortgage its property, or to reserve for its own use an amount of its capital stock, not exceeding ten per cent thereof. At the same time, the several trustees appeared in court and consented to a confirmation of the sales upon the agreement that the stipulations of the purchasers thus given be embodied in the decrees approving and confirming the sales. Thereupon appropriate orders of confirmation containing the required stipulations were entered, and the proper conveyances made. In the order confirming the sale under the land-grant mortgage, it was provided that the new corporation should, as part of the consideration for the conveyance, compromise or pay such claims against the old company as Huntington, Ripley, and Henry A. Whitney might within one year approve, and upon such terms and in such manner as they should prescribe.

On the 22d of February, 1875, Charles H. Richardson, Frank Shaw, and David S. Greenough, of Boston, representing themselves to be holders of a large amount of the bonds, filed their petition in court, asking that the decree of confirmation might be modified by striking out the clause requiring payment of the claims against the railroad company, and that the provisions of the decrees relating to the exchange of bonds for stock in the new corporation might be extended until the question of modification should be decided. As one of the grounds of this application, it was alleged that Weld and Atkins were creditors of the railroad company. This petition was answered by the several trustees explaining the facts. On the 13th of April, the time for exchanging bonds for stock in the new corporation was extended for sixty days, and the order for the payment of claims against the railroad company so modified as to make the approval of a claim by the court necessary before it could be paid, and providing for notice to Richardson, Greenough, and Shaw whenever a claim was presented for allowance.

On the 6th of July, 1875, Greenough, as owner of $58,000 of the bonds, and Shaw, as owner of $11,000, filed in the circuit court, in each of the cases, what is denominated a bill of review, in which they ask that the decrees be reviewed and reversed, and they placed in the same situation they would have been if the decrees had not been rendered. The errors complained of relate to the sufficiency of the allegations in the original bills; the confirmation of the sales, by the consent of the trustees, upon the terms stipulated for; a want of jurisdiction in the court, as the complainants and many of the defendants were citizens of the same state; and the rendition of a decree against the railroad company, without service of subpœna, after filing the amended bill. It was also alleged that Gookin and Atkins, trustees of the mortgages, were holders of bonds secured by the respective trusts. Demurrers to both bills were filed, which the court below sustained, and dismissed the suits. Shaw and Greenough thereupon appealed.

B. C. Brown, for appellants. C. W. Huntington, for appellee.

Mr. Chief Justice WAITE, after stating the facts in the foregoing language, delivered the opinion of the court.

We think it clear that the appellants are not entitled to the relief they ask. They were not parties to the original suits, except through their trustees, against whom they make no charges. Indeed, their counsel says in his brief, "It is probable that they [the trustees] believed that they were doing the best possible for their beneficiaries." The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding. To avoid what the trustee has done in his behalf, he must proceed in some other way than by bill of review. All the errors complained of in these bills of review, as occurring before the confirmation of the sale, are such as affect only the railroad company injuriously. If, in fact, they are errors at all, they were in favor of the trustees and those they represent, and not against them. Of these the trustees could not complain. As no relief was granted under the amendment to the bill in the foreclosure of the railroad mortgage, the court clearly had jurisdiction of that case for the purposes of the decree as rendered.

But if the bills, as filed, are original in their character, to set aside the decrees complained of and not for review only, the appellants are in no better condition. The trustees had an undoubted right to commence these suits when they did, and it is apparent from the whole record that all their proceedings, both before and after the sale, were in the interest of their beneficiaries generally, since one hundred and eighty in

number, representing in the aggregate eight million out of the eight million five hundred thousand dollars of bonds outstanding, accepted the result and exchanged their bonds for stock in the new corporation. To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretence even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust. This company and these trustees were peculiarly situated. The road was unfinished, and the land grant, to a large extent, unearned. While the mortgages, as they stood, were first liens, there was great danger that their value would be seriously impaired unless more money could be raised. The attention of both the trustees and bondholders was called to that fact, and at first it seems to have been thought that the end might be accomplished through the instrumentality of a receiver and receiver's certificates. This necessarily contemplated the creation of a lien on the mortgaged property superior to that which then existed. Although the mortgages were separate, and on separate properties, the value of each depended, to a large extent, on the ability of the railroad company to finish its road.

For some reason the idea of a receiver and receiver's certificates seems to have been abandoned, and what, to our minds, was a much more desirable plan adopted. The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required without asking the courts to engage in the business of railroad building. The result, so far as incumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution.

The bare fact that some of the trustees were holders of bonds secured by their trust is not sufficient of itself to make them incompetent to consent to such a decree as was rendered. From the whole case it is apparent that from the beginning their conduct was governed by the wishes of a very large majority of bondholders. If there was anywhere the slightest evidence of fraud or unfaithfulness, their conduct would be carefully scrutinized. The acts of trustees when personally interested should always be open and fair. Slight circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done. But when every thing is honestly done, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts.

Here the name of Gookin, one of the trustees, appears in the list of bondholders appointing the committee to make the purchase at the sale as the holder of two hundred thousand dollars of the bonds. Associated with him in the list were others representing near six millions of dollars. His name openly appeared on the paper when the court was asked to confirm the sale on the conditions agreed to. Certainly this is not sufficient to defeat the plan to which he and his associates gave their consent. Atkins, another trustee, was a creditor of the company, whose debt came within the provision made in the decree for payment by the new corporation. All this was fully explained to the court when the modification of the decree in this particular was asked for, and since no claim can now be paid except with the approval of the court after notice to the appellants, we see no reason why what has already been done is not sufficient for the protection of all concerned.

On the whole, we see no reason for interfering with the decrees below, and they are each, therefore, affirmed.

Carrier must use the utmost care for safety of passenger. Insurer of passenger's luggage. Limitation by notice. Negligence.

CAMDEN & AMBOY R. R. CO. v. BURKE.
(13 Wend. 611.)

Supreme Court of New York. May, 1835.

Error from superior court of New-York City. Burke brought his action against the company, the proprietors of a line of steamboats and of a railroad and carriage between New-York and Philadelphia, for damage done to the wardrobe, music and musical instruments of his minor son, Master Burke, a stage player, by the wardrobe, &c. falling into the water at Bordentown, whilst the agents of the company were in the act of passing the baggage from a steamboat of the company to the cars upon the railroad. Master Burke was a passenger, in the line of the company, from Philadelphia to New-York, in December, 1833, and had with him a number of trunks, containing his wardrobe, &c.; he paid not only for his passage, but an extra sum for the transportation of his baggage. The mode of conducting the operations of the company is thus: After the boat is under way, the baggage of the passenger is placed in a crib, which, on the arrival of the boat at Bordentown, is removed from the steamboat to the cars on the railroad by means of a crane—a stationary fixture on the wharf. The fall from the crane is by a rope attached to a pulley with a large double and single block. The rope and block straps used at the time of the accident were four and a half inches in circumference. In removing the baggage, the strap of one of the blocks gave way or broke, and the crib with the baggage fell into the water, by means of which the injury complained of was sustained. The crib alone weighs 510 lbs., and the whole weight at the time of the accident was less than 3,000 lbs. A rope of the thickness of that employed at the time of the accident is capable of sustaining a weight of at least three tons. The captain of the steamboat, who had been a sea-faring man for 14 years, examined the rope immediately after the accident, and could not discover the cause of its giving way—there was no assignable cause for the accident. The block had been strapped and been in use seven or eight months. The block strap broke short off; it was covered with spun yarn and leather where it broke. Another witness, a seaman and rigger, who fitted the blocks and strapped them, testified that the rope ought to have lasted upwards of a year. Since the accident, the company use a rope five and three-fourths inches in circumference. The agent of the company, whose business it was to superintend the wharf at Bordentown, testified that he examined the ropes daily, and that they were sound as far as the human eye could discover. Where the rope broke, a defect could not have been discovered without taking off the spun yarn, which had not been done, nor had he examined particularly to see whether the rope had lengthened; it did not appear to him that it had. It was proved that there were notices affixed in different parts of the boat, on which were printed the words, "All baggage at the risk of the owner," which were seen by Master Burke. Forty pounds baggage were allowed to a pasesnger, as covered by his fare; for all over, an additional charge was made—the same sum being asked for 140 lbs. as for the fare of a passenger, and so in proportion. Master Burke paid $1.50, for his baggage. Several witnesses testified as to the extent of injury to the wardrobe, &c. Chief Justice Jones, of the superior court, charged the jury, that if the loss was to be ascribed to the negligence and want of care of the persons employed in the carriage of the goods, the defendants, whose agents they were, must confessedly be held responsible for it in damages; but that, in the present case, those who are charged with the transportation of the goods, had been guilty of no culpable negligence or want of care, and the evidence conclusively showed that the strap gave way, not from the improvident overcharge or unskillful or careless management of the crane and its machinery, but from some secret and unknown defect in the rope itself, not discoverable on inspection, nor discernible with out examination of the interior of the rope composing the fall; and that therefore the liability of the defendants for the damages was purely a question of law, how far the defendants were responsible for the sufficiency of the vehicles employed in the transportation, and of the crane and its machinery, for the safe removal of the goods from the one to the other; and, in reference to that question, the chief justice charged the jury that if they were satisfied, from the evidence, that the loss or damage in the present case was occasioned by the inadequacy and defect of the machinery employed in the removal of the goods from the steamboat to the railroad car, the defendants were answerable for it, notwithstanding that the defect in the strap to which it was owing, was uuknown to the carriers, and not discoverable on inspection, and the loss may have happened without any culpable negligence or want of care of the carriers, or their agents, in the application or management of the crane and its machinery, at the time. The judge further charged the jury, that the notification to the following purport, "All baggage at the risk of the owners," shown to have been published by the defendants in the boat, would not protect them from the loss, if attributable to the defect of the machinery. The counsel for the defendants excepted to this charge. The jury found a verdict for the plaintiff for $500, upon which judgment was entered. The defendants sued out a writ of error.

J. Anthon, for plaintiffs in error. D. Graham, Jr., for defendant in error.

SAVAGE, C. J. The plaintiffs in error insist that they are carriers of passengers; that as such they are bound to supply carriages and machinery, sound and sufficient, as far as the eye and judgment can discover, and if an accident occurs, with the exercise of care and diligence, it is actus Dei, and they are not responsible. The defendant in error contends that the plaintiffs are not only carriers of passengers, but carriers of goods; common carriers, and answerable as such. Story, Bailm. 379, is referred to by both counsel, as stating the rule correctly as to carriers of passengers, where he says: "The passenger carrier binds himself to carry safely those whom he takes into his coach, as far as human foresight and care will go; that is, for the utmost care and diligence of very cautious persons." But if, as the defendant's counsel contends, the plaintiffs are common carriers, they are, in the language of Chancellor Kent (2 Kent, Comm. 527), "in the nature of insurers, and are answerable for accidents and thefts, and even for a loss by robbery; they are answerable for all losses which do not fall within the excepted cases of the act of God, or inevitable accident." And though notice might be sufficient to excuse them from thefts and robberies, it would not from accidents occurring from the insufficiency of their own vehicles and machinery for the transportation of the goods.

It is certain that different rules have been applied to the transportation of persons, and the transportation of goods. The case of Christie v. Griggs, 2 Camp. 80, was a case of the former description. The plaintiff was badly bruised by the breaking down of the stage coach of the defendant; and on the trial he proved the fact of breaking down from the failure of the axletree, and that he was severely injured. The defendant insisted that the plaintiff should go further, and show the insufficiency of the coach, or the unskilfulness of the driver; but Chief Justice Mansfield said that the plaintiff had made out a prima facie case, and it then lay with the defendant to show that his coach was as good a coach as could be made, and the driver was as skilful as could be found. The defendant did produce evidence of the skilfulness of the driver, and that the axle had been recently examined, and no defect discovered. The chief justice said that if the axletree was sound, as far as human eye could discover, the defendant was not liable. This case is relied on by the plaintiff in error, and thus far would be strong in their favor, if the same rule was applicable to the carriers of persons and the carriers of goods; for it is not disputed that the rope which broke was apparently sufficient. But Sir J. Mansfield proceeds, and says, there is a difference between a contract to carry goods and a contract to carry passengers; for the goods the carrier is answerable at all events, but he did not warrant the safety of his passengers. His contract with them was to provide for their safe conveyance, as far as human care and foresight would go. The same doctrine, that so far as personal injury is concerned, the question is entirely one of negligence, is found in 2 Esp. 533; and Sharp v. Grey, 9 Bing. 457, sustains the same position. Chancellor Kent has briefly stated the law relating to this case: In the aggregate body of common carriers are included the owners of stage wagons and coaches. 2 Kent, Comm. 598. The proprietors of stage coaches do not warant the safety of passengers in the capacity of common carriers; they are not responsible for accidents, but for want of due care; but as to the baggage of the passengers, the modern cases place coach proprietors upon the ordinary footing of common carriers. Id. 600, 601. The proprietors of steamboats for the transportation of passengers and their baggage, are common carriers, and responsible for the baggage, without special compensation for it. Allen v. Sewall, 2 Wend. 327; 11 Johns. 109; 9 Wend. 114. It is clear, therefore, that the same care and diligence which would excuse the carriers in case of accident to passengers, would not excuse them for damage to or loss of goods. In the case of passengers, the carriers are responsible only for negligence; but in respect to their baggage, they are responsible as common carriers, and accident is no excuse. The reason for the distinction is not very apparent in the present state of society; but the difference seems to be settled upon authority.

The notice, it has been intimated, was probably intended to guard against liability for theft, or robbery or mistake, 1 Pick. 54; but the notice would not excuse from actual negligence or misconduct. The loss in this case was by accident, but by such an accident as in a common carrier is accounted negligence. Whether the loss happened by the negligence of the defendant or not, it happened by their acts, or the acts of their servants; and for such losses the notice ought not to excuse them. The notice is general, and according to its terms, imports entire irresponsibility under all circumstances; but it has never been understood to excuse the carrier from accidents arising from the breach of the implied agreement in all such cases, that the vessel, or coach, or vehicle, whatever it be, is sufficient for the business in which it is employed. 5 East, 428. As common carriers, the law imposes a liability upon the defendants. That liability was qualified by the notice, so far as to excuse them from losses happening by means of the conduct of others, from robbery or larceny; but not from such losses as arise from the acts of themselves or their servants.

The result is, that although the proprietors of public conveyances are not responsible for injuries to the persons of passengers, unless they happen from the want of such care

and diligence as is characteristic of cautious persons, yet they are liable for the baggage of passengers, at all events, except such losses as arise from inevitable accident, or the enemies of the country, where no notice is given. Where notice is given that all baggage is at the risk of the owners, such notice excuses them from losses happening by theft or robbery, in addition to the exemptions from responsibility as common carriers, but not from losses arising from actual negligence, or from the insufficiency of their machinery or vehicles. The loss in this case arose from the insufficiency of the machinery; and although it could not be discovered by the eye, yet for this the defendants are responsible at all events.

Judgment affirmed.

Fall of berth in sleeping car. Measure of carrier's duty. Use of car owned by another corporation. Duty of inspection. Servants of another company in charge of car. Proof of plaintiff's poverty; of dependent family. Evidence erroneously admitted, but jury told to disregard it.

PENNSYLVANIA CO. v. ROY.

(102 U. S. 451.)

Supreme Court of the United States. Oct., 1880.

Error to the circuit court of the United States for the Northern district of Illinois.

J. T. Brooks and George Willard, for plaintiff in error. John Van Arman, for defendant in error.

Mr. Justice HARLAN delivered the opinion of the court.

This is a writ of error from a judgment for the sum of $10,000, the amount assessed as damages sustained by the defendant in error, in consequence of personal injuries received while riding, as a passenger, in a sleeping-car which belonged to the Pullman Palace Car Company, but constituting, at the time the injuries were received, a part of a train of cars managed and controlled by the Pennsylvania Company, as lessee and operator of the Pittsburg, Fort Wayne, and Chicago Railway. The action was commenced in the supreme court of Cook county, Illinois, against the Pennsylvania Company, the Pittsburg, Fort Wayne, and Chicago Railroad Company, and the Pullman Palace Car Company. It was subsequently dismissed by the plaintiff against all the defendants except the Pennsylvania Company, and then removed for trial into the circuit court of the United States for the Northern district of Illinois, where the judgment complained of was rendered.

The facts set forth in the bill of exceptions, so far as it is material to detail them, are these:—

On the 5th of June, 1876, Roy, the defendant in error, purchased at the office of the lessee company, in the city of Chicago, a "first-class railroad ticket" from that city to Philadelphia, over the line of that company, paying therefor the sum of $14.40. At the same time and place, and of the same person, he purchased a sleeping-car ticket, issued by the Pullman Palace Car Company, for the route between the same cities, and for that ticket he paid the additional sum of $5. He took the train the same day, going immediately into the section of the sleeping-car corresponding to his ticket.

The next morning, at Alliance, Ohio, upon the invitation of a friend, travelling upon the same train, he entered the sleeping-car in which that friend was riding, and there engaged with him in conversation. While so engaged, the upper berth of the section in which they were sitting fell. Thereupon the porter of the sleeping-car came at once and put up the berth, saying it would not fall again. Shortly thereafter the berth fell a second time, striking the plaintiff upon the head, injuring his brain, incapacitating him from pursuing his vocation, and necessitating medical treatment.

After the second falling of the berth, the brace or arm supporting it was found to be broken.

The evidence introduced by the plaintiff tended also to show that the Pennsylvania Company provided cars in which passengers having railroad tickets could ride without purchasing a sleeping-car ticket; that Roy had much experience in traveling, and would have gone into one of those cars had he not purchased a sleeping-car ticket; that at the time he purchased it he did not know what company ran the sleepers, but upon taking the train he ascertained it was a Pullman car; that the Pullman Palace Car Company was engaged in furnishing cars to be run in the trains of railroad companies; that, besides the general conductor of the train, there was a conductor, in uniform, and a porter, whose duty it was to make up the berths and attend to the wants of passengers occupying the sleeping-car.

Upon the trial the plaintiff introduced a time and distance card of the defendant corporation, issued, published, and circulated by that company during the year 1876, prior to the date of his injuries. That card, referring to the "Fort Wayne and Pennsylvania R. R. line," stated that three express trains left Chicago daily, one "with popular vestibule sleeping-car," one "with drawing-room and hotel car," and one "with drawing-room sleeping-car." It gave notice that "passage, excursion, and sleeping-car tickets" could be purchased at the defendant company's office in Chicago. Referring to the "Fort Wayne and Pennsylvania line," the same card announced that "no road offers equal facilities in the number of through trains, equipped with Pullman palace sleeping-cars." It states, among the advantages of the "Pittsburg, Fort Wayne, and Pennsylvania through line," that the latter was the "only line running three through trains, with Pullman palace-cars," and "the only line running sleeping-cars from Chicago and intermediate stations to Philadelphia without change." The same card gave the rates charged for berths and sections in Pullman sleeping-cars from Chicago to points east of that city.

The defendant, to maintain the issues on its part, offered to prove—

1. That the sleeping-car in which the accident occurred, and all the sleeping-cars then and theretofore on the defendant's line, since the 27th of January, 1870, were owned by the Pullman Palace Car Company, a corporation of the state of Illinois, and not by the defendant; that said sleeping-cars were run in the same trains with the defendant's cars; that holders of railroad tickets were entitled to ride in said sleeping-cars, provided they also held sleeping-car tickets.

2. That the Pullman Palace Car Company, and it only, issued tickets for sale, entitling passengers to ride in said sleeping-cars; that such tickets were plainly distinguishable from railroad tickets, and were sold at offices established by said company, and indicated as places for the sale of such tickets; that the plaintiff purchased the sleeping-car ticket of the same person of whom he bought the railroad ticket; that the office where purchased indicated by plain lettering upon its door that it was a place for the sale of Pullman Palace Car Company tickets, as well as railroad tickets.

3. That the Pullman Palace Car Company employed persons to take charge of its cars, and the latter, whilst in use, were in the immediate charge of a conductor and a porter employed by that company; that such conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and the appurtenances thereto.

To this proof the plaintiff objected, and the objection was sustained, to which ruling the company excepted.

The court thereupon charged the jury that the proof tended "to show that the injury was received by reason of the negligence of the defendant's agents or servants, or by some negligence in the construction of the car in which the plaintiff was riding." To that charge the company at the time excepted, upon the ground that it was unsupported by the testimony, and because it assumed as a fact that the persons in charge of the sleeping-car were the company's agents or servants.

The court further charged the jury that "the defendant has offered in your presence to prove that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation. But I instruct, as a part of the law of this case, that if the car composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the defendant is liable."

To that charge also the defendant excepted.

We are of opinion that there was no substantial error, either in excluding the evidence offered by the defendant, or in the charge to the jury. The court only applied to a new state of facts, principles very generally recognized as fundamental in the law of passenger carriers. Those thus engaged are under an obligation, arising out of the nature of their employment, and, on grounds of public policy, vigorously enforced, to provide for the safety of passengers whom they have assumed, for hire, to carry from one place to another. In Railroad Co. v. Derby, 14 How. 468, it was said that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence,—that the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents. This doctrine was expressly affirmed in The New World v. King, 16 How. 469. In Stokes v. Saltonstall, 13 Pet. 181, affirming the decision of Mr. Chief Justice Taney on the circuit, we said, that although the carrier does not warrant the safety of the passengers, at all events, yet his undertaking and liability, as to them, go to the extent that he or his agents, where he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely. The principles there announced were approved in Railroad Co. v. Pollard, 22 Wall. 341, where, speaking by the present chief justice, we said that we saw no necessity for reconsidering Stokes v. Saltonstall.

These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the passengers, belong to others.

The undertaking of the railroad company was to carry the defendant in error over its line in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, constituting a part of the carrier's train, for an additional sum paid to the company owning such car.

As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such

car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars,—it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employés of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey. 2 Kent, Comm. (12th Ed.) 600; 2 Pars. Cont. (6th Ed.) 218, 219; Story, Bailm. §§ 601, 601a, 602; Cooley, Torts, 642; Whart. Neg. (2d Ed.) § 627 et seq.; Chit. Car. 256 et seq., and cases cited by the authors.

It is also an immaterial circumstance that Roy, when injured, was not sitting in the particular sleeping-car to which he had been originally assigned. His right, for a time, to occupy a seat in the car in which his friend was riding was not, and, under the facts disclosed, could not be questioned.

Whether the Pullman Palace Car Company is not also, and equally, liable to the defendant in error, or whether it may not be liable over to the railroad company for any damages which the latter may be required to pay on account of the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any question between it and others.

Upon the trial below, the plaintiff was allowed, against the objection of the defendant, to make proof as to his financial condition, and to show that, after being injured, his sources of income were very limited.

This evidence was obviously irrelevant. The plaintiff, in view of the pleadings and evidence, was entitled to compensation, and nothing more, for such damages as he had sustained in consequence of injuries received. But the damages were not, in law, dependent in the slightest degree upon his condition as to wealth or poverty. It is manifest, however, from the record, that the learned judge who presided at the trial subsequently recognized the error committed in the admission of that testimony. After charging the jury that the measure of plaintiff's damages was the pecuniary loss sustained by him in consequence of the injuries received, and after stating the rules by which such loss should be ascertained, the court proceeded: "But the jury should not take into consideration any evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured; the real question being, how much his ability to earn money in the future has been impaired."

Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is, that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the court. To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final sub-

mission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval.

There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children,—a son ten years of age, and three daughters of the ages, respectively, of fourteen, seventeen, and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict.

The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence in regard to the financial condition of the plaintiff; but as nothing was said by it touching the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn, and should not be ignored in the assessment of damages.

For this error alone the judgment is reversed, and the cause remanded for a new trial.

So ordered.

Sunday law. Presumptions as to violation. Carrier's duty, independent of contract. Diligence required. Condition of injury, not necessarily its cause. Exit from depot. Invitation to use. Safe means of egress to be provided.

DELAWARE, LACKAWANNA & WESTERN R. R. CO. v. TRAUTWEIN.

(52 N. J. Law, 169, 19 Atl. 178.)

Court of Errors and Appeals of New Jersey. Feb. 20, 1890.

Error to supreme court.

Bedle, Muirheid & Magie, for plaintiffs in error. Leon Abbett and William F. Abbett, for defendant in error.

DEPUE, J. Emma Trautwein, the defendant in error, on Sunday, the 11th of September, 1887, was a passenger on a train of the Delaware, Lackawanna & Western Railroad Company from New York city to Lyndhurst, N. J. She took passage in the company's train, leaving New York at 9 o'clock in the evening, and reached Lyndhurst about 9:35 P. M. She alighted from the train, and in leaving the station to reach the street fell over some railroad ties, and received injuries for which this suit was brought. On a verdict for the plaintiff below, and judgment thereon, this writ of error was brought, and errors assigned upon the rulings of the trial judge. The act concerning vice and immorality provides that no traveling, worldly employment, or business, ordinary or servile labor, or work either upon land or water, (works of necessity and charity excepted,) shall be done, performed, or practiced by any person or persons within this state on Sunday. The penalty prescribed for violating this statute is the forfeiture of one dollar for every such offense, to be recovered upon conviction, and paid for the use of the poor of the township in which the offense was committed. Revision, p. 1227, § 1. The section contains a proviso that it should be lawful for any railroad company in the state to run one passenger train each way over its road on Sunday for the accommodation of the citizens of the state. This proviso has the effect not only to give to the company a right to run the specified trains on Sunday, but also confers the right upon the citizen to use such trains for ordinary travel. Smith v. Railroad Co., 46 N. J. Law, 7. As between the company and a passenger on its train, it would seem that the latter would have the right to assume that the train on which he is received as a passenger is the train run under the protection of the proviso, whatever effect the duplication of trains might have in subjecting the company to the penalty. There is also some evidence that the purpose of the plaintiff in going to New York on that day was to obtain from a physician a prescription and get medicine for her mother,—a purpose that would probably exempt the plaintiff from the penalty prescribed by the act. But an instruction to the jury, put on record in the bill of exceptions, put the plaintiff's case on a broader ground. The trial judge assumed that the company was running this train in violation of the statute, and that the plaintiff was also traveling in violation of the statute, and instructed the jury that these circumstances did not debar the plaintiff of her right to recover. If this proposition be sound, it will not be necessary to consider the rulings of the trial judge in construing the proviso, and with respect to the purpose of the plaintiff's journey on that day on her right to recover. In Massachusetts, Maine, and Vermont it has been held adversely to the legal proposition adopted by the trial judge. In the federal courts, and in the courts of other sister states, the decisions have been in accordance with the ruling of the trial judge. A contract to carry made on Sunday, or to be performed on Sunday, is by force of the statute illegal and void. No action could be maintained for the breach of such a contract, nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied. Reeves v. Butcher, 31 N. J. Law, 224. It is also clear that a plaintiff will fail where, to make a cause of action, he is compelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments. Marshall v. Railroad Co., 11 C. B. 655; Martin v. Railroad Co., L. R. 3 Exch. 9; Gladwell v. Steggall, 5 Bing. N. C. 733; Pippin v. Sheppard, 11 Price, 400; Carroll v. Railroad Co., 58 N. Y. 126. In Austin v. Railroad Co., L. R. 2 Q. B. 442, a suit was brought against a railroad company by a child three years and two months old. The plaintiff's mother, carrying the plaintiff in her arms, took a ticket for herself, but not for the child, for passage on the defendant's railway. In the course of the journey an accident happened, and the plaintiff's leg was broken. In a suit for this injury the defendants contended that they were under no contract with the plaintiff, and that they carried the plaintiff without any hire or fare paid for carrying him. The action was held to be maintainable. BLACKBURN, J., said that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely." The English cases to this effect are cited and commented on in Foulkes v. Railroad Co., 5 C. P. Div. 157–169. The rule may be considered as settled that a railroad company, having accepted a passenger, is under an obligation to take due and reasonable care for his safety, and that that obligation arises by implication of law, independent of contract. To give the plaintiff a standing in court to sue for the in-

jury, she has no need of the aid of a contract which was illegal.

Nor was the plaintiff's violation of the Sunday law, in a legal sense, the cause of her injury. It was only the occasion for an injury by the defendant's wrongful act, and hence her wrong-doing did not contribute to the injury in such a sense as to deprive her of her right of action. It was merely a condition, and not a contributory cause, of the injury. Thus in White v. Lang, 128 Mass. 598, it was held that if a person, while unlawfully traveling on Sunday, is injured by the assault of a dog, the act of traveling was not a contributory cause of the injury, and that he could, notwithstanding his own violation of the law, maintain his action against the owner of the dog. In sustaining the suit, the court said: "If a person who is at the time acting in violation of law receives an injury caused by the wrongful or negligent act of another, he may recover therefor if his own illegal act was merely a condition, and not a contributory cause, of the injury. * * * It is true that, if he were not traveling, he would not have received the injury; but the act of traveling is a condition, and not a contributory cause, of the injury." The ninety-second section of the road act (Revision, 1012) provides that all wagons and other wheel carriages of every kind or description, traveling or passing on the highways within this state, belonging to residents therein, shall track on the ground not less than four feet and ten inches, under the penalty of five dollars for each offense, to be recovered, one moiety of which is to be paid to the overseer of the highways, and the other to the informer. The penalty in this statute, like that in the Sunday law, is prescribed for the purpose of prohibition, and not revenue, and a citizen traveling a public highway with a wagon of a narrower track than that named in the statute is engaged in violating the law. In some parts of this state the use of pleasure and business wagons of the New York guage, which is narrower than that of our statute, is quite common. In collision cases on public highways or at railroad crossings, the defense that plaintiff is debarred of his action on the ground of contributory negligence, for the reason that the wagon which he was driving did not conform to the statutory guage, has never occurred to counsel, who are usually astute in discovering grounds of defense under the doctrine of contributory negligence. In my experience, it has never been thought worth while to inquire in such cases as to the track of the wagon injured or destroyed in such a collision, and a defense on that ground would obviously receive no consideration. The cases sustaining the ruling of the trial judge on this head are numerous. They are cited and approved by leading text-writers in discussing this subject. Bish. Non-Cont. Law, §§ 63, 64; 2 Wood, Ry. Law, § 318; Beach, Contrib. Neg. § 81; Cooley, Torts, (2d Ed.) 178 *155 et seq., and notes. On principle, as well as by the weight of authority, the ruling of the trial judge was correct.

The station at which this accident happened was located upon an embankment elevated above the public road, which crosses the railroad under a bridge carrying the railroad over the public road. The company had a depot building for the reception of passengers on a level with the track on the north side of its track. At the west end of this building there were steps for the accommodation of passengers, leading down to the public road. On the south side of the embankment there was a stairway leading also to the public road, built by private persons residing in that neighborhood for their own convenience, and used by passengers as means of access to and from the station. The company did not construct or keep this stairway in repair. The stairway rested against the embankment of the railroad. It was on the company's grounds, and led to the public street. From the depot building to the top of this stairway there was a gravel walk, and the employees of the company testified that the passage was kept free and open and unobstructed. It was apparently a way provided as a means of access to and from the company's depot grounds. On the occasion when the plaintiff received her injury the train reached the station at 9:35 P. M. The night was dark and stormy. There was no light in or about the depot building, and no person there to direct passengers as to the way to leave the depot grounds. The plaintiff, in crossing the tracks on her way to the stairway, fell over some timber, and received the injury for which she sues. The plaintiff testified that the only time she was at that depot before that night she used this stairway, and that she knew of no other passage to or from the depot. The judge submitted to the jury the question whether the plaintiff was justified in using this way out from the depot, in this language: "Did the plaintiff do right in taking this way out. That depends upon the question whether this way of passage was there by the recognition, procurement, or assent of the company, as a means for the entrance and exit of passengers. Proof of such approval by the company, or of its recognition, need not be made by any resolution or declaration of the company, or of its agents. If to persons of ordinary understanding and discernment it appeared to be such a way, and by the company it was allowed to remain and be in use by passengers going to or from trains, any one going to and from a train as a passenger was authorized to make use of it. If the company permitted it to be done openly, so that persons of reasonable judgment and discernment would conclude it to be a means of entrance and exit, then any passenger was authorized to take it and use it. It is submitted to you as a question of fact whether, to an ordinary observer, this was held out as one of the passage-ways from the depot to the public street. If so, any passenger, unwarned, might use it as such. If

you should so find, it is entirely immaterial who built the stairway or who kept it in repair."

The duty of a railroad company, as a carrier of passengers, does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe. If there be two ways, one of which is faulty in construction or repair, a passenger using it, and injured by its faulty condition, will not be debarred of his action, although the other, which he might have used, was safer. Longmore v. Railroad Co., 19 C. B. (N. S.) 183. A company, having provided one safe and convenient way of ingress and egress to and from its station, may, as contended for by the company's counsel, suffer private persons, for their own convenience, to have and use another way of access across its depot grounds, and it may be that those who use such a way will do so at their peril, if they have notice of the private character of the way. But that is not this case. The passage-way taken by the plaintiff led to the public street, and had every indication of having been provided for use by the public, as a way to and from the station. Under the charge of the court and the finding of the jury, it must be taken to be the fact that this way of passage was there by recognition, procurement, or consent of the company, and that by sufferance and use it had obtained such an appearance of a passage-way passengers were invited to use, as that persons of reasonable judgment and discernment would conclude it to be a means of entrance and egress. It was of a passage-way having these characteristics that the judge said that it was immaterial who built the stairway, or who kept it in repair.

In Beard v. Railroad Co., 48 Vt. 101, there was a stairway for passengers through the company's depot building, and also a stairway at each end of the passenger platform. The stairway at the north end was open at the top, and there was nothing to indicate that it was not for the use of passengers. In fact, that stairway was built by an express company, and was used exclusively by the express company for removing express freight, and opened into the street, over a platform for loading and unloading express wagons. The plaintiff, a passenger, in attempting to pass down the stairway in the dark, fell, and was injured. For this injury she sued the railroad company. The defendant's counsel requested the trial judge to charge the jury that the plaintiff could not recover unless she snowed that the lower platform, in stepping from which she was injured, was on the defendant's premises. The court declined to so instruct the jury, but told the jury that the plaintiff, to recover, must establish that the company was guilty of negligence in leaving the stairway where it left the upper platform open, and without any guard or notice to warn passengers that the stairway was not to be used as a way of passage to the street below, and that she was injured by such negligence or want of care on the part of the defendant without any neglect or want of care on her part contributing to the injury. This instruction was held to be correct. The court, in sustaining the instructions of the trial judge, speaking of the likelihood of a stranger to regard that stairway as designed to furnish a safe way of getting to the street, said. "If not so designed, and it was unsafe to a stranger for such a purpose in the darkness, it was the duty of the defendant to forefend against injury by closing up the head of the stairs, or by notifying in some effectual way against using those stairs for getting to the street. * * * In view of the unquestionable law, the request to which the exception was taken seems frivolous. The open stairs on the margin of the platform led the plaintiff, without fault on her part, to the point of harm. * * * The fact that the bottom of the pitfall on which the plaintiff landed, and thereby received hurt, was beyond the line of ownership of the defendant, neither relieves the duty, nor mitigates the fault, of the defendant." In the case in hand, contributory negligence by the plaintiff was negatived by the jury. The case is here solely on the use of the passage-way by the plaintiff, and the duty of the company with regard to its condition and safety. We think the instruction of the trial judge on that subject was correct. A passage-way having the characteristics mentioned by the judge became by the company's act a passage-way which passengers were invited to use, with respect to which the company was under a duty to have it kept reasonably safe for use. A passenger using the way under such an invitation was not bound to inquire by whose contributions the stairway was erected or maintained. Nor was the company absolved from its duty in the premises by the fact that it erected and maintained at its own expense another way of exit. The other exceptions on the record have been examined. We find no error in the conduct of the trial, and the judgment should be affirmed. Affirmed unanimously.

Duty of protection. Ticket calling for evidence to identify holder. Unreasonable requirements by conductor. Signature of party. Exceptions.

NORFOLK & WESTERN R. R. CO. v. ANDERSON.

(90 Va. 1, 17 S. E. 757.)

Supreme Court of Appeals of Virginia. June 15, 1893.

Error to circuit court, Nansemond county.

Action by W M Anderson against the Norfolk & Western Railroad Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by LEWIS, P.:

Error to judgment of circuit court of Nansemond county, rendered April 11, 1892, in an action of trespass on the case, wherein W. M. Anderson was plaintiff, and the Norfolk & Western Railroad Company was defendant. The action was brought to recover damages for the alleged wrongful expulsion of the plaintiff from one of the defendant's passenger trains. There was a verdict and judgment for the plaintiff for $2,000 damages and costs. The declaration states, in substance, and the evidence shows, that on the 17th of March, 1890, the plaintiff purchased of the defendant company a 1,000-mile or commutation ticket for travel or its road; that attached to the ticket, and forming part of it, were certain printed conditions, the first and second of which were in these words: "(1) That this ticket is good only for the person in whose name it is issued, and shall be taken up, and forfeited, if presented by any other person. (2) That when requested by the conductor, at the time the ticket is presented for passage, or the station baggage agent, when presented for the purpose of having baggage checked, I will sign my name, in the presence of either, on the back of the highest numbered coupons required for the trip, and will otherwise identify myself as the original purchaser of the ticket." At the bottom of the printed conditions (14 in number) the plaintiff was required to sign his name, which he did in the presence of the attesting witness, W. C. Masi, city ticket agent of the defendant company at Norfolk. On the 24th of May following the plaintiff took passage on one of the defendant's passenger trains, leaving Norfolk in the morning, intending to go to Suffolk, a point on the defendant's road about 20 miles west of Norfolk, and thence, that afternoon, to Richmond, via Petersburgh. Before entering the train he presented his ticket, then containing unused coupons for 400 miles of travel, to the defendant's baggage agent, who, without raising any question as to his identity, checked his baggage through Richmond. The plaintiff was at the time a traveling salesman for the A. B. C. Chemical Company. When the conductor came around to collect fares, after the train left Norfolk, the plaintiff presented him his ticket, from which to extract the necessary coupons for travel between Norfolk and Suffolk. The conductor asked if the signature above mentioned was the plaintiff's, to which the latter replied that it was, but he refused to recognize the ticket unless the plaintiff would identify himself. The latter then offered to sign his name as stipulated, but the conductor refused to accept that as evidence of identity, saying to the plaintiff that if he signed his name he would, of course, sign the name that was on the ticket, and, besides that, he (the conductor) was no judge of handwriting. The plaintiff then remarked that he was a stranger in that section, that he knew no one on the train, and that he had no other means of identifying himself than by writing his name. The conductor still refused to accept such evidence, and inquired of the plaintiff if he had any letters on his person, addressed to himself. To this the plaintiff replied that he had not; that his name was in his baggage, which had been checked through to Richmond. The conductor then insisted that he go into the baggage car, and get out of his baggage any letters therein, which he declined to do, as unreasonable. The train was then running at its usual rate of speed. The conductor next inquired if he had in his pocket an order book, such as drummers usually carry, whereupon the plaintiff produced one, upon the fly leaf of which was dimly written, in pencil, "E. W. Wells, 248 Halifax St.," and on the same page, below Wells' name, was the following: "709 E. Clay St., Anderson," —the latter being also written in pencil, and more dimly. It does not appear, however, that the conductor saw, or had his attention called to, the last name, or that plaintiff himself knew at the time it was there. In fact, he says he did not. The conductor, upon seeing Wells' name, inquired how it came to be there, to which the plaintiff answered that he had copied it from the city directory of Petersburgh, as the name of a person he wished to see, whereupon the conductor took up the plaintiff's ticket, and told him he would have to pay his fare. To this the latter replied that he would not pay fare, and demanded a receipt for his ticket, which the conductor at first refused to give, unless he would pay fare. Before he took up the ticket, the conductor said to the plaintiff: "If you will return this ticket to the scalper from whom you got it, he will, no doubt, refund you your money." Meanwhile the train was nearing Suffolk. "When the train stopped at the depot," says the plaintiff, in his testimony, "I kept my seat, which was next to the window, and when the train was about ready to start the conductor came to the window, and told me he could not carry me any further, and that I must get off. I told him I would not get off, and that I would stay on the train until I got a receipt for my ticket. He then told me, if I would come into the office in the depot, he would write me a receipt. I went in, and he wrote a receipt in the name of E. W. Wells, seeing which, I told him that was not my name. He answered that was the name he knew me

by, and that he had every reason to believe it was my name. I then turned to the freight agent, telegraph operator, or some other employé, who was standing by, and asked him to witness that I protested that that was not my name, but he said he would have nothing to do with it. By that time the conductor had boarded the train, and the train had pulled out." The plaintiff then goes on to say that he transacted his business that day in Suffolk, and took the evening train for Richmond, paying his fare. Soon after the plaintiff's arrival in Richmond the secretary and treasurer of the chemical company reported the occurrences first mentioned to the defendant's passenger agent in Richmond, who in turn communicated on the subject with the general passenger agent at Roanoke. These officers, however, although assured that the plaintiff's ticket had been unlawfully taken up,—that is that he was the bona fide purchaser of the ticket, as he had represented to the conductor,—refused to return it unless the plaintiff would surrender the conductor's receipts, which he decided to do. Indeed, the general passenger agent ultimately went further, for in his letter to plaintiff's attorney he wrote as follows: "Dear Sir: Yours of yesterday, requesting that thousand-mile ticket bearing name of W. M. Anderson, lifted by a conductor of this road, be sent to you, is received. I regret that I must decline this request. The conditions of the contract under which this ticket was sold having been violated, the right to use the same for transportation has been forfeited." At the trial there was little or no material conflict in the evidence. The foregoing is the substance of the case.

Geo. S. Bernard and W. H. Mann, for plaintiff in error. Jackson Guy and E. E. Holland, for defendant in error.

LEWIS, P., after stating the case, delivered the opinion of the court.

In determining whether the judgment is right or not, it is important to observe, in the first place, what the contract between the parties was. Its language is that "when requested by the conductor, at the time this ticket is presented for passage, [the purchaser of the ticket] will sign my name, in the presence of the conductor, on the back of the highest-numbered coupons, for the required trip, and otherwise identify myself as the original purchaser of the ticket." This means that the person presenting the ticket will identify himself, when identification is required—First, by signing his name; and, secondly, in any other manner that may be reasonably required. It is not that he will sign his name, if that particular mode of identification is requested by the conductor, but that he will do so whenever called upon by the conductor for identifying himself. This was evidently the intention of the parties, and the words employed are not inconsistent with such intention. Assuming this to be the true construction of the contract, we are of opinion that the plaintiff is entitled to recover. As was said in Railroad Co. v. Ashby, 79 Va. 130, "the carrier's duty is to carry his passengers safely and respectfully, and if he intrusts this duty to his servants the law holds him responsible for the manner in which they execute the trust." The same principle has been repeatedly affirmed by the supreme court of the United States. "A common carrier," says that court, "undertakes absolutely to protect its passengers against the misconduct of its own servants engaged in executing the contract," and, "whatever the act of the servant be,—one of omission or commission, whether negligent or fraudulent,—if it be done in the course of his employment, the master is liable." Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039. The defendant relies on the case of Railroad Co. v. Wysor, 82 Va. 250, but that case widely differs from the present. There the plaintiff, in willful violation of the contract, tendered detached coupons for his passage, which the conductor refused to receive. The evidence, moreover, showed that he got on the train with the expectation and intention of being ejected therefrom, with a view to making a case for damages, and this court very justly held that he was not entitled to recover. But here no such circumstances exist, nor is there anything upon which bad faith can be imputed to the plaintiff. When his offer to identify himself in the only mode specifically stipulated for was rejected, he was warranted in refusing to do more. Had he been permitted to sign his name, and had the conductor, upon examining his signature, been left in doubt as to the sufficiency of the evidence, he might then have required any additional evidence of identity that was reasonable. But when he arbitrarily refused to receive the evidence which it was his primary duty to have accepted, accompanying his refusal, as he did, with gross insult to the plaintiff, which was afterwards repeated at Suffolk, he had no right to require the plaintiff to "otherwise identify" himself. He had no right, in other words, to repudiate a part of the contract and to require the plaintiff to comply with the residue. And it makes no difference that he declared himself "not a judge of handwriting." For the purposes of a case like this, at least, the company, in effect, contracted that he was. At all events, it cannot now escape liability on the ground that he was not. The contract must be taken in all its parts, and effect given to the whole. There was, moreover, a further violation of the contract, in taking up the ticket, inasmuch as the only stipulated ground of forfeiture was the presentation of the ticket for passage by a person other than the original purchaser thereof; and, not only this, but, after the circumstances of the case

had been reported to the general passenger agent, the alter ego of the company, he refused to return the ticket, thus ratifying what had been done. We concur, therefore, in the view that the jury were not only warranted in finding for the plaintiff, but that the case is a proper one for exemplary damages. The conduct of the conductor was not only illegal, but may be justly termed wanton and malicious. "Every unlawful act," said the court, speaking by Judge Staples, in Borland v. Barrett, 76 Va. 128, "done willfully or purposely, to the injury of another, upon slight provocation, is, as against such person, malicious, and the law so presumes." And the subsequent ratification by the company of the acts complained of brings the case within the principle holding a corporation liable in exemplary damages for the misconduct of its agents. Railway Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261. It is true the plaintiff was not forcibly ejected, but he was told by the conductor, after his ticket had been taken up, that he must get off of the train; and what was done amounted, in contemplation of law, to an expulsion, though no force to remove him was exerted.

The next question, then, is whether the damages given by the jury are excessive. That the sum awarded is greater than the actual damages suffered by the plaintiff is not disputed. But it is to be considered that when exemplary damages are allowed the object of the law is not only to recompense the sufferer, but to punish the offender, and thereby to deter others from like offending. In Day v. Woodworth, 13 How. 363, the court said: "It is a well-established principle of the common law that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called 'exemplary,' 'punitive,' or 'vindictive' damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but, if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." And in numerous subsequent decisions of the same court the rule has been declared that whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to compensatory damages, but may give such exemplary damages as, in their opinion, are called for by the circumstances of the case. Railroad Co. v. Quigley, 21 How. 202; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501; Railroad Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286; Railway Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261. The same doctrine was diffused by the court in Borland v. Barrett, 76 Va. 128. A corporation, like a natural person, may be held liable in exemplary damages for the act of an agent, where the act is participated in or authorized, or, as in the present case, ratified, by the principals. Railway Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261. And, as the measure of the defendant's liability must depend upon the particular circumstances of each case, it is a matter largely left to the discretion of the jury, whose finding will not be disturbed, unless so out of the way as to evince passion, prejudice, partiality, or corruption in the jury. Borland v. Barrett, 76 Va. 128; Peshine v. Shepperson, 17 Grat. 472, 488; Fairish v. Reigle, 11 Grat. 697; Railroad Co. v. White, 84 Va. 498, 5 S. E. 573; Zinc Co. v. Black's Adm'r, 88 Va. 303, 13 S. E. 452. Referring to this rule in the recent case of Ward v. White, 86 Va. 212, 9 S. E. 1021, which was an action for assault and battery, it was said: "The reason for holding parties so tenaciously to the damages found by the jury in personal torts is that in cases of this class there is no scale by which damages are to be graduated with certainty. They admit of no other test than the intelligence of the jury, governed by a sense of justice. It is, indeed, one of the principal causes in which trial by jury has originated." Applying this rule to the circumstances of the present case, the verdict must stand. It is true that the recovery is a large one; but it is not so disproportioned to the injury inflicted, and the character of the offense, as to "shock the understanding," or to induce the belief that the jury were influenced by improper motives. And when this can be affirmed of a verdict, in a case of this sort, it would be an invasion of the province of the jury, and therefore an abuse of power on the part of the court—especially an appellate court—to set it aside.

It is contended, however, that the circuit court erred, at the trial, in failing to exclude certain illegal evidence, and that for this error the judgment should be reversed. But there is nothing in this objection. It appears that soon after the occurrences mentioned in the declaration the plaintiff unsuccessfully attempted to travel on the defendant's road, on the conductor's receipt for his ticket. After this had been narrated to the jury the defendant's counsel objected to the evidence on the ground that it was not relevant to the case stated in the declaration, and ruled to exclude it. The judge ruled that the evidence was illegal, and said he would hear a motion to exclude it at a later stage of the proceeding. To this there was no exception, nor was the court's attention again called to the matter before the verdict was rendered, and that was a waiver of the objection. Telegraph Co. v. Hobson, 15 Grat 122, 138; Page v. Clopton, 30 Grat. 415, 429. This sufficiently disposes of the case, and renders it unnecessary to consider the assignment of error in regard to the instruction. It is enough to say that the case was submitted to the jury in substantial conformity to the views expressed in this opinion, and that the judgment must be affirmed.

Liability for money in trunk, how limited. Notice to baggage master. Agency.

ST. LOUIS SOUTHWESTERN RY. CO. v. BERRY et ux.

(60 Ark. 433, 46 Am. St. Rep. 212, 30 S. W. 764.)

Supreme Court of Arkansas. April 20, 1895.

Appeal from circuit court, Monroe county; James S. Thomas, Judge.

Action by Pleas and Kate Berry against the St. Louis Southwestern Railway Company to recover for the loss of money shipped with baggage. From a judgment for plaintiffs, defendant appeals. Affirmed

Sam H. West and J. C. Hawthorne, for appellant. M. J. Manning and David A. Gates, for appellees.

WOOD, J. The appellant asked the following instructions: (1) "The jury are instructed that a railway company is not liable for the loss of money shipped as baggage, in excess of an amount necessary to be used while on a journey." (2) "If the jury find from the evidence that the defendant is not engaged in transmitting money, it would not be liable for the loss of money, when shipped as baggage, even if its agents were informed that money was contained in the trunk shipped as baggage." The court refused these, and, in effect, charged the jury that if a passenger, who had no notice of the company's instructions to its agents forbidding the taking of money for transportation as baggage, delivered to the agent of the railway company a trunk containing money, to be transported as baggage, and informed the agent who checked the trunk that it contained money, and the agent, after being so informed, received the same, that then, in case of loss, the carrier would be liable. The requests given and refused present the only question for our determination.

The carrier is liable, as insurer, for money which the passenger, bona fide, includes in his baggage to pay traveling expenses, and for personal use on his journey, provided no more is taken than is necessary or usual for passengers of like station, habits, and condition in life, while on similar journeys. Hutch. Carr. §§ 682, 685, 688; Schouler, Bailm. §§ 669–671; Story, Bailm. § 499; 3 Wood, R. R. § 401; Jordan v. Railroad Co., 5 Cush. 69; Ror. R. R. 988; Ang. Carr. § 115; 2 Beach, R. R. § 901; 2 Redf. R. R. 59. For any amount in excess of this,—which is a question for the jury,—the carrier is not liable, as such, unless he receives it with notice that the quantity is greater than is usually carried by passengers under the same or similar circumstances. And the passenger must observe the utmost candor and good faith in presenting his baggage for transportation, for the carrier is only required to transport according to appearances. If the passenger presents his baggage in a closed receptacle, such as is ordinarily carried as baggage, in order to lay upon the carrier the extraordinary responsibility of insurer the passenger must inform him if it contains any articles which the carrier is not bound to transport as baggage. This for the reason that the carrier, when thus notified, may refuse to carry altogether, or accept and charge an additional sum to the passenger's fare for the onerous liability he thus assumes. Schouler, Bailm. § 669 et seq.; Hutch. Carr. § 685; Edw. Bailm. § 529; 3 Wood, R. R. §§ 401, 406, 408; Railroad Co. v. Fraloff, 100 U. S. 24; 2 Beach, R. R. 902; Davis v. Railroad Co., 22 Ill. 278; Railroad Co. v. Copeland, 24 Ill. 332. The baggage master is not out of the scope of his employment when he receives more money for transportation as baggage than, by the rules of the company or instructions from his employer, he is authorized to receive, for the carrier does carry some money as baggage. And the agent whose business it is to receive and check for baggage has the implied authority to bind his employer, the carrier, by virtue of the nature of his employment, and the duties incident to it. Hutch. Carr. § 688; 3 Wood, R. R. § 408; Minter v. Railroad Co., 41 Mo. 503; Strouss v. Railway Co., 17 Fed. 209. As was said by a distinguished judge of New York: "The contract to carry the baggage of passengers, as incident to the contract to carry the person, does not become defined, as to particular baggage, its amounts, or other incidents, until the baggage is delivered to the baggage master." Isaacson v. Railroad Co., 94 N. Y. 278. We conclude that where a passenger, who is ignorant of the rules or instructions of railway companies forbidding their agents to receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount, if he accepts it to ship as baggage, and a loss occurs, the carrier's common-law liability will attach. We are aware that a different rule prevails in some of the states, notably Massachusetts. Blumantle v. Railroad Co., 127 Mass. 322; Alling v. Railroad Co., 126 Mass. 121; Jordan v. Railroad Co., 5 Cush. 69. See, also, Bomar v. Maxwell, 9 Humph. 620; Collins v. Railroad Co., 10 Cush. 506. But the weight of authority is with the rule as we have announced it. Railroad Co. v. Baldauf, 16 Pa. St. 67; Hutch. Carr. § 685; Jacobs v. Tutt, 33 Fed. 412; Railroad Co. v. Fraloff, 100 U. S. 24; Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711; Railway Co. v. Shepherd, 8 Exch. 30; Minter v. Railroad Co., 41 Mo. 503; and other cases cited in brief of counsel for appellee. While most of these cases have reference to merchandise in some form, yet the rationale of the doctrine, as to it, is equally applicable to money where it is carried as baggage. As to what would be the rule if the money was accepted and carried as freight is nowhere presented. The proof on the part of plaintiffs showed that the agent who checked the trunk was informed of the amount of money it contained before he checked it for transportation. The instructions, therefore, being in harmony with the law, and the verdict of the jury having evidence to support it, the judgment of the Monroe circuit court is affirmed.

Delivery of passenger's luggage. Warehouseman. Failure to deliver raises presumption of negligence. Connecting lines.

BURNELL v. NEW YORK CENTRAL R. R. CO.

(45 N. Y. 184.)

Court of Appeals of New York. March 21, 1871.

Action by a passenger to recover the value of lost baggage. From an order of the general term reversing a judgment for plaintiff, plaintiff appealed. Reversed.

A. C. Morris, for appellant. James Matthews, for respondent.

CHURCH, C. J. The plaintiff took passage, at Palmyra, on the defendants' road for New York, and purchased a ticket and checked his trunk to the latter place. On his arrival in New York, the plaintiff, without calling for his baggage, went to Brooklyn, and the second day after his arrival presented his check and demanded his trunk, but it could not be found, and has not since been found. This action was brought to recover the value of the trunk and contents. The referee found that the trunk was lost through the negligence of the defendants and their servants, and that the plaintiff was entitled to recover, upon which a judgment was entered, which was reversed by the general term in the first district, and a new trial ordered, from which the plaintiff appealed to this court.

The supreme court placed its decision upon the ground that the defendants' liability ceased with the transportation of the trunk by the Hudson River Railroad Company to New York, and its readiness to deliver it within a reasonable time after arrival, and that whatever responsibility was incurred afterward, in keeping or storing it, was incurred by the latter company, for which the defendants were not liable.

The correctness of this decision depends upon the nature of the contract between carrier and passenger, in respect to the custody and care of baggage upon the failure of the owner to call for it within a reasonable time after its arrival at the place of destination.

As to what is a reasonable time cannot be definitely determined, but must be left to the circumstances of each case. Up to the expiration of that period the strict liability of common carriers continues. After that a modified liability, analogous to that of warehousemen only exists. The rule of exemption from strict liability was carried to the utmost limit of propriety, to say the least of it, in Roth v. Railroad Co., 34 N. Y. 548.

It is unnecessary to attempt a definition of reasonable time, as applied to this subject in this case, because it is clear that sufficient time had elapsed to relieve the carrier from his peculiar liability as insurer of the property. But there still remained a duty or obligation on the part of the Hudson River Company, to exercise ordinary care in keeping and preserving the property until it was called for, or was disposed of according to law. The question is whether this obligation, with its modified liability, was imposed by the contract of carriage, or whether it was a new and independent obligation arising from the unprovided for and accidental circumstance of leaving the trunk in possession of the carrier. If the latter is the correct theory, then the defendants are not liable, and the action should have been against the Hudson River Company; if the former, they are liable, because by their contract they assumed the responsibility of every duty and obligation imposed by the contract of carriage. The Hudson River Company were their agents in performing the contract.

In considering such questions it is proper to regard the improved facilities of traveling, with its incidental contingencies, accidents and conveniences, and the usual mode of transacting such business, to the end that while on the one hand, onerous and unnecessary duties should not be imposed upon the carrier by an unnatural or arbitrary construction of the contract, on the other hand, that it should be so construed as to afford reasonable protection to the public. The rule applicable in the construction of all contracts, that existing facts and all the surrounding circumstances, are to be regarded for the purpose of effectuating the intent of the parties is also to be applied. I think the duty or obligation referred to of storing the property and exercising ordinary care to preserve and protect it upon the happening of the contingent event of its not being called for, was incurred at the time the contract was made, and is a part of the contract itself. It is to be presumed that the parties intended to provide for every contingency incident to the subject of the contract.

Leaving baggage with a carrier by railroad, either for temporary convenience, from necessity, sickness or accident is not such an unusual or exceptional circumstance, as to create a presumption that it was not within the contemplation of the parties at the time the contract was made.

The duty of exercising care over property thus remaining in their possession, is a part of the duty of carriers, incidental it is true to their principal or main duty, but nevertheless incumbent upon them, and it is no less a duty growing out of their relation of carriers, because their liability is mitigated to that of ordinary bailees for hire. Besides this is the ordinary mode in which this business has been transacted, as the evidence in this case shows, and as all railroad companies are in the habit of doing. Baggage thus left is and always has been kept and cared for, and the manner of disposing of it, if not finally called for, was long since regulated by law (Laws 1837, p. 311), and it is presumed that the parties contracted with reference to the existing state of facts, and to the customary manner of transacting such business.

The other view terminates all relations be-

tween carrier and passenger, immediately upon the expiration of the "reasonable time," within which the baggage must be called for, and transforms the carrier into a mere accidental finder, or gratuitous bailee liable only for gross negligence. In other words, it makes two contracts in every case where baggage is left, and complicates the rights and duties of the respective parties, and while it essentially impairs the security of the public, confers no substantial benefit upon the carrier. Its tendency would be to induce carelessness and negligence, where care and vigilance are necessary. The fair construction of the contract is that the defendants agreed for a consideration to transport the plaintiff and his trunk to New York, and deliver the latter to him on its arrival, if called for, if not that it should be properly stored, and reasonable care exercised to prevent injury or loss until it was called for, or was lawfully disposed of. This simplifies the transaction, carries out the intention of the parties, legalizes the uniform practice, and does justice to the carrier and the public. Although the rule on this subject has not been very definitely settled, yet the principles herein indicated are not new. Cary v. Railroad Co., 29 Barb. 35; Norway Plain Co. v. Boston & M. R. Co., 1 Gray, 271, and cases cited.

These views in effect determine the liability of the defendants in this action. The Hudson River Company being the agents of the defendants in performing the contract, and the contract of storage, being a part of the original contract of carriage, it follows that the defendants are liable for the loss in this case if any one is liable. Allen, J., in 29 Barb. 35, said: "There was but one contract, one hiring, and one consideration paid for the carriage and storage of the baggage; the contract for storing resulting from and being an incident to the main contract for carriage. It follows that the party liable upon the main and express contract is liable upon the incidental and implied contract, and the Buffalo and State Line road, in the storage as in the carriage of the trunk must be deemed the agent of the defendant performing its contract." Hart v. Railroad Co., 8 N. Y. 37; Quimby v. Vanderbilt, 17 N. Y. 306.

The only remaining question is whether a cause of action was established, based upon the negligence of the Hudson River Company. The failure of that company to produce the subject of bailment when demanded, prima facie established negligence and want of due care. When there is a total default to deliver the goods bailed, on demand, the onus of accounting for the default lies with the bailee. Platt v. Hibbard, 7 Cow. 497–500, note a; Schwerin v. McKie, 5 Rob. (N. Y.) 404, and cases cited. It is claimed that the failure to produce the trunk, and the charge of negligence is fully met by the evidence produced on the part of the defendants, that the building used for storing baggage was safe and secure and in charge of trusty agents and servants, and properly guarded night and day. There was no evidence as to how this particular trunk got out of the possession of the Hudson River Company. If it had been burned or stolen, without fault on their part, the defendants would not have been liable.

The evidence certainly shows a commendable vigilance in the general arrangements to protect this class of property, but it fails to point out how or by what means this trunk was lost. The inference that it was delivered to the wrong person by mistake is quite as legitimate as that it was stolen. To say that the servants were generally careful, does not establish as a question of law, that they were not careless in respect to this article. It was incumbent on the defendants to show that the loss of this trunk was not attributable to the want of care of their servants, and the evidence was such that the referee was justified in finding that they had failed to do it.

If this trunk was delivered to the wrong person the circumstances should have been shown, otherwise it would be presumed negligent, as no such delivery would be proper without the presentation of the duplicate check, or satisfactory evidence of its loss, and of the ownership of the property. If the trunk had been delivered upon such evidence as vigilant, careful persons would regard as sufficient, the defendants might have been relieved from liability, but no evidence of this character was produced, and we think the finding of the referee was fully warranted.

The order granting a new trial must be reversed, and the judgment affirmed.

RAPALLO, J., dissents. ANDREWS, J., took no part.

Order granting a new trial reversed, and judgment affirmed.

Coupon through ticket. Contract to carry beyond terminus of first line, when inferable. Action against each carrier for his default. Baggage checked through. Action for its loss against first carrier.

LOUISVILLE & NASHVILLE R. R. CO. v. WEAVER.

(9 Lea, 38.)

Supreme Court of Tennessee. April Term, 1882.

Appeal from circuit court, Shelby county; C. W. Heiskell, Judge.

Estes & Ellett, for appellant. L. B. McFarland, for appellee.

COOPER, J. The judge of the circuit court tried this case without a jury, and rendered judgment in favor of the plaintiff below, Jane E. Weaver, against the Louisville & Nashville Railroad Company for the amount claimed for loss of baggage, and the company appealed.

The trial judge found that the plaintiff purchased from the agent of the defendant at Memphis through coupon tickets for herself and family from Memphis, Tennessee, via Milan, St. Louis and Omaha, to San Francisco, California, and started on the trip May 29, 1877; that her baggage was checked by defendant's agents at Memphis from that city to Omaha; that this baggage was delivered in good order, on the same day, by the defendant, to the next connecting road at Milan in this state, and that the loss sued for occurred before the plaintiff with her baggage reached Omaha. The judge further found that the plaintiff, upon discovering her loss after she arrived at San Francisco, applied to the Union and Central Pacific Railroad Companies for compensation for the loss; that the companies denied any liability, but, upon the return trip of the plaintiff in November, allowed her a deduction of between one and two hundred dollars on the cost of transportation over their roads to Omaha, in consideration of her release of all claim against the said Union and Pacific Railroad Companies for the alleged loss, and that the plaintiff agreed in writing to these terms.

The tickets issued by the defendant to the plaintiff contained a separate coupon for each railroad company over whose road she would pass en route, the defendant's road only extending from Memphis to Milan. Each coupon contained a memorandum that it was issued by the defendant, the name of the railroad company owning that part of the line, and the names of the places at which that part of the line commenced and ended. The coupons did not purport on their face to be issued by the several companies, nor were they signed with any name. The only signature was that of the general ticket agent at the end of the last coupon. The check given for the baggage was the usual metal check.

The judgment rendered was for the full amount claimed without deduction.

It is well settled that a railroad company, as a common carrier, may contract to carry to a point beyond the terminus of its own line so as to become liable for its delivery at that point, and that the liability thus attaching at the commencement will continue throughout the whole transit, all connecting lines of carriers employed in furthering and completing such transportation becoming its agents, for whose default it is responsible. Railroad v. Stockard, 11 Heisk. 568; Hutch. Carr. § 145. But the courts are not in accord as to what will, prima facie, constitute such a contract.

In England the courts from the first adopted the rule, to which they have firmly adhered, that where a railroad company, as a common carrier, receives goods directed to a place beyond the terminus of its own line, without limiting its responsibility by express agreement, such receipt of the goods, so directed, is prima facie evidence of an undertaking to carry the goods to the place to which they are directed, and all connecting railroad companies or other carriers, along the route are merely the agents of the first company. The latter is alone subject to suit for any loss or damage to the goods, the other companies not being responsible to the owner for want of privity of contract. Muschamp v. Railway Co., 8 Mees. & W. 421. The same rule has been applied to a through contract for the carriage of a passenger and his baggage. Myrton v. Railway Co., 4 Hurl. & N. 415.

The rule, founded as it is on common law principles, has much to recommend it by reason of its uniformity and simplicity, and has been found to work well for the comparatively short distances of carriage in the British Islands. It has been followed by the courts of a number of states in this country, but modified generally so as to give an action against the carrying company actually guilty of the wrong out of which the cause of action arises, although not the original contracting company. All of the American courts, perhaps, except it may be of Georgia, concur in adopting the English rule, with the modification suggested wherever the contract is clearly a through contract, or the circumstances show that the contracting company has an interest, as partner or otherwise, in the entire route. Hutch. Carr. § 160. The courts of the state of Georgia seem to have adopted the English rule without qualification. Many of the state courts have been led to modify the rule not only in allowing the actually defaulting carrier, other than the first, to be sued, but in the matter of the prima facie evidence of a through contract and the burden of proof. The reason of the latter modification may, probably, be found in the greater distances of carriage in this country and the larger number of connecting lines. Another cause for the change of the burden of proof may be also found in the form of through ticket, known as the coupon ticket, used by our roads.

The question has been before this court on several occasions. In the earliest of the cases, the suit was brought by a passenger against the first carrier for the failure of the second carrier to comply with the contract. The defendants sold to the plaintiff a through ticket from Nashville to Memphis. The defendants were the proprietors of a stage line for the first part of the route. Another company owned the residue of the stage line to the point where it connected with the Memphis & Charleston Railroad, which ran thence to Memphis. By an arrangement between these three parties, it was agreed that passengers might pay the whole fare at either end of the line, and receive a through ticket. There was no proof to show that the plaintiff knew of the arrangement between the carriers. "We think," says Harris, J., who delivers the opinion of the court, "that when the defendants received the plaintiff's money, and gave him a through ticket, they thereby became bound for his transportation on the entire line, and that he was entitled to a strict performance by the defendants of their undertaking, or to recover compensation in damages for any breach thereof. The arrangement between the defendants and the proprietors of other portions of the line was a matter with which the plaintiff had nothing to do. He was no party to that agreement, nor was he bound to look to any person for the performance of the defendants' undertaking but themselves. If either party was guilty of a breach, that was a matter for adjustment between themselves. By the arrangement, the proprietors at each end of the line were authorized to receive the fare, and give through tickets to show that they had undertaken and received pay for the transportation of the passenger over the entire line, and the proprietors of the other portions of the line were their agents, whom they trusted to perform that part of the contract which lay on that portion of the line owned by them. If this view of the subject be correct, and we think it is, then it was wholly immaterial whether the plaintiff knew of this arrangement or not. If the defendants, when they sold plaintiff the ticket, intended that he should risk the proprietors of the other portions of the line to carry him through, then they should have so stipulated, and informed him frankly of this arrangement, so that he might, with full knowledge of the facts, have elected whether he would pay the entire fare and take through tickets, or pay them only for that portion of the line of which they were the proprietors, and make his own arrangements for the balance of the journey. They assumed, however, to carry him through, and are responsible for the undertaking." Carter v. Peck, 4 Sneed, 203.

In the case of Railroad Co. v. Nelson, 1 Cold. 276, the suit was for the failure on the part of the railroad company to transport wheat, shipped to New York, in due time, under a special contract. "If," say the court, "the carrier, or his servant within the scope of his employment, enter into any special contract to deliver in any particular time and place, even beyond the terminus of his particular route, it will be binding."

In the case of Railroad Co. v. Rogers, 6 Heisk. 143, the plaintiff shipped freight at Chattanooga to Atlanta, Georgia, taking a receipt from the defendant of the delivery of the articles "to be forwarded" by the East Tennessee and Georgia Railroad, subject to freight and the regulations of the company. The articles, consisting of provisions, were spoiled and rendered valueless by the negligent detention of the agents of a connecting road. A recovery against the first company was sustained. Judge Freeman, who delivers the opinion of the court, notices the conflict between the English and American rulings, and cites the previous decisions of this court. "These cases," he says, "follow the principles of the English decisions, and we think lay down the sounder doctrine on the subject." The rule adopted is that a carrier, by simply taking charge of goods delivered to him for carriage, marked and destined to a particular place beyond the terminus of his own road, without an express limitation of his responsibility, and a fortiori if he undertakes in terms to deliver, which is the meaning of the words "to be forwarded," is bound to deliver at the place in due time. "It would," adds the judge, "seriously incommode the business of the country if, when property is shipped by one road, and must pass over more than this road in order to reach its destination, the shipper, in case of injury to his goods, is to inquire how many routes and how many different companies make up the line between the place of shipment and delivery, or to determine at his peril which company is liable for the injury."

In the subsequent case at the same term, of Railroad Co. v. McElwee, 6 Heisk. 208, the charge of the trial judge in accordance with the rulings in the previous cases, was sustained. Judge Freeman, who delivers the opinion of the court, again reviews the conflicting decisions, and after expressing the opinion that the tendency of the later American rulings is in favor of the English rule, adds that the case of Carter v. Peck "is an emphatic endorsement of the English rule, and is the proper one in all such cases."

The next case in our Reports raised the question of the liability of an intermediate carrier to deliver goods promptly to the next carrier. The goods had been shipped at Philadelphia on the Pennsylvania Central Railroad, directed to Linton, Kentucky, under a contract which limited the Pennsylvania Company to the terminus of its road, "and the proof indicated that the liability of the delinquent road, the Louisville and Nashville Railroad, was to be governed by the same contract." Judge McFarland, who delivered

the opinion of the court, refers to the two preceding cases as then recently decided, and as holding, "that where there are two connecting lines of railway, and one road receives goods for transportation, marked and consigned to a point beyond the terminus of its own road, but on the line of the connecting road, the road first receiving the goods will be held liable for their delivery at their destination, unless this liability is limited by express contract." "These cases," he adds, "somewhat change the rule followed by perhaps a majority of the American cases, and follow the English rule." Railroad Co. v. Campbell, 7 Heisk. 253.

Shortly afterwards, this court heard and disposed of the case of Furstenheim v. Railroad Co., 9 Heisk. 238. The plaintiff bought from the Pennsylvania Railroad Company in New York a through coupon ticket from New York to Memphis. He received metallic checks for his baggage calling for Memphis. His coupon ticket was recognized and the coupons taken up by the railroad companies along the route. The proof tended to show that the breaking into the baggage and loss of contents, for which the suit was brought, occurred on the Pennsylvania road. The suit was against the last carrier. Nicholson, C. J., in delivering the opinion of the court, undertakes to discuss the legal import and extent of the contract between the plaintiff and the Pennsylvania Company, concluding thus: "All we have before us is the simple fact that the Pennsylvania Central Company sold plaintiff tickets which were recognized as good along the whole line, and which carried him to Memphis. Without other facts and circumstances proven, we are bound to hold that the Pennsylvania Central Company undertook for itself to transport plaintiff and his baggage to Memphis, and that, as there is no privity shown between plaintiff and the defendants, the latter cannot be held responsible for the loss shown to have occurred before the baggage reached their road." This conclusion, it will be observed, is also in accord with the English rule, in so far as it requires privity of the contract to sustain an action against any of the carriers other than the one in default.

Afterwards the direct question of the liability of the intermediate carrier of freight for his own default was raised. A lot of fruit trees were shipped in North Carolina, directed to the plaintiff at Jackson, Tennessee, which the defendant, the Memphis & Charleston Railroad Company, received from a preceding carrier, and failed to deliver to the succeeding carrier, because the latter refused to pay the accrued freights. The trial judge instructed the jury that if the defendant received the packages, directed to the plaintiff at Jackson, Tenn., without any special contract limiting their undertaking, the law imposed upon the company the obligation to deliver the goods at their destination, and they would not be excused by the facts relied on. "This," says Judge McFarland, delivering the opinion of the court, "is in accord with the cases recently decided by the court of Railroad Co. v. McElwee. In these cases the question was fully discussed, and need not be again examined." Railroad v. Stockard, 11 Heisk. 568.

The question again came before the court at the April term, 1877, at this place. Goods were shipped at Cincinnati, packed in boxes or cases, directed to the plaintiffs at Somerville, Tenn., and delivered to the Louisville, Cincinnati and Lexington Railroad Company. This company gave a receipt, specifying that the goods were to be transported, and delivered to the Louisville and Nashville Railroad Company at Louisville, subject to certain conditions noted. One of the conditions was that the liability of the company should terminate upon the delivery of the goods to the next line of transportation. The defendant was the last carrier in the line. The boxes were delivered by the defendant to the plaintiff, who, upon opening them, discovered that some of the goods were missing. It was admitted "that the goods were lost somewhere between Cincinnati and Somerville, but where is not known." It was agreed, upon the authority of Furstenheim's Case, that the action could not be maintained because there was no privity of contract between plaintiffs and defendant. But it was held that the reason only applied where the loss sued for occurred upon the line of the company with whom the contract was made, and that there was no intimation in Furstenheim's Case that an action might not have been maintained against the last company for its own default. And it was expressly held that upon the delivery of the goods to the defendant, it became liable for them as a common carrier, subject at most only to the limitation stipulated for on its behalf by the first company. The judgment against the defendant was sustained upon the ground that the defendant admitted the receipt of the goods without objection, and that it was impossible for the plaintiffs to show where the loss occurred. "Upon grounds of public policy," says McFarland, J., in delivering the opinion, "it is better to put upon the carrier the duty of tracing up the loss, and fixing it upon the party first liable, than to put the duty on the owner." Railroad Co. v. Holloway, 9 Baxt. 188.

All of the foregoing cases recognize the English rule upon the receipt of freight by a carrier directed to a point beyond its terminus, without any limitation upon its liability, but modify it, in accordance with the great weight of American authority, so as to sustain an action against any carrier on the line for its own default. And by the last case it is determined that any carrier in the line is in default, and may be sued for a loss, where the carrier has received the packages or boxes containing the goods without objection. The case of Carter v. Peck, the only one which relates to the personal

rights of a passenger, and Furstenheim's Case, the only one relating to the baggage of a passenger, both follow the English rule. A through ticket, without more, would prima facie render the first carrier liable upon the contract for the default of the other carriers in the line of transportation in the case of passengers and their baggage, as in the case of the shipment of goods. A through contract as to the passenger will be a through contract as to his baggage, in the absence of a different arrangement. But, as in the case of goods, although the first carrier may contract and be responsible for the entire transportation, any subsequent and auxiliary carrier to whose fault it can be traced will be liable to the owner for the loss of his baggage. Hutch. Carr. § 715. The courts of several of the states concur in holding the first company liable for the loss of baggage in the case of a through ticket. Railroad Co. v. Copeland, 24 Ill. 332; Candee v. Railroad Co., 21 Wis. 582; Wilson v. Railroad, 21 Grat. 654; Burnell v. Railroad Co., 45 N. Y. 184. But the check for the baggage may be given by one company for part of the line when the passenger has a through ticket from another company, in which case the former will be liable for the loss. McCormick v. Railroad Co., 4 E. D. Smith, 181; Straiton v. Railroad Co., 2 E. D. Smith, 184. So, no doubt, the check may, as in the case before us, be issued with the ticket, but for only part of the way. In such a case, the check may be considered as standing in the place of a bill of lading for the distance called for, and imposes the duty to carry and deliver accordingly. Dill v. Railway Co., 7 Rich. Law, 158; Wilson v. Railroad Co., 21 Grat. 654.

It is conceded by the learned counsel of the plaintiff in error in the case before us that, by our decisions as given above, the whole liability in regard to passengers, baggage and freight, is thrown upon the company issuing the ticket or bill of lading, except where an express stipulation to the contrary is shown. But he insists that the rule was changed by Holloway's Case, 9 Baxt. 188, and Sprayberry's Case, 9 Heisk. 852, 8 Baxt. 341. But Holloway's Case, as we have seen, only extends the modification of the English rule, by which the American courts allow an action against the actual defaulting carrier in addition to the first carrier, so as to give the action against any of the carrying companies shown to have received the goods without objection, where it is impossible for the plaintiff to show in what part of the route the loss occurred. And in Sprayberry's Case, the court, while exonerating the first carrier from liability for the loss of life of a passenger by the negligence of another carrier on the line under the circumstances, decided nothing in regard to the liability for the loss of the baggage, remarking that there were authorities holding that a different rule applied to passengers from the rule applicable to freight and baggage. Railroad Co. v. Sprayberry, 9 Heisk. 857. In that case, Sprayberry purchased from an agent of the Nashville & Chattanooga Railroad Company, at Chattanooga, tickets for himself, wife and two children, from that place to Shreveport, Louisiana. The tickets were coupon tickets, and indicated the route to be by the Nashville & Chattanooga road to Nashville, and by other connecting roads to Memphis, and from that point to Shreveport by steamboat. While en route on the Mississippi river, and in the state of Mississippi, an accident occurred, by which the wife and children were drowned. It appeared in proof that the different lines of road were separate and distinct, owned and controlled by different agents and officers, and that there was no contract or privity between them in regard to carrying passengers except the arrangement to sell through tickets. Under these circumstances, the court held that the first company was not liable to the husband for the damages given to him by a statute of the state of Mississippi for the loss of his wife and children through the fault of the steamboat company. "We are of opinion," says the court, "that in such cases the company selling the ticket shall be regarded as the agent of the other lines, when the tickets themselves import this, and nothing else appears."

The form of the tickets is not given, but the language of the opinion fairly implies that they showed upon their face the agency of the issuing company, which might be either in words or by each coupon purporting to be the ticket of the company over whose connecting line it was to be used. Such was the form of the ticket in Miluor v. Railroad Co., 53 N. Y. 363. The plaintiff bought from the defendant a ticket of two coupons to Sheffield, and received a through check for his trunk. Each coupon purported to be the ticket of one of the two companies over whose roads the passenger was to travel, containing the name of the company, and being signed by different officers. In such a case, each coupon may well be treated as the separate ticket of a company issued by the selling company as agent. In the case before us, the ticket, it will be remembered, is in form the ticket of the defendant, the coupons only desiguating the company over whose road the particular coupon was to be used, and the termini of the route. If, as suggested by the learned counsel of the plaintiff in error, the presumption of law for or against the first company arises from the form of the ticket, we cannot say that the form adopted, although with coupons, shows it to be anything more than the ticket of the issuing company. It is substantially like the ticket, with three coupons for three several companies, in Hart v. Railroad Co., 8 N. Y. 37, where the baggage of the passenger was checked through, and the defendant

held liable for its loss as the company issuing the ticket and receiving the baggage, although owning the last road on the route.

The weight of American authority undoubtedly is that one carrier may sell to a passenger its own ticket, and at the same time the ticket of connecting lines, entitling the passenger to through transportation over all the lines, and may receive the fare for the whole distance, without becoming responsible for the carriage of the passenger beyond its line. The tickets for the several lines are in such cases known as coupon tickets, and each ticket, apparently without reference to the form, being considered as the separate contract of the carrier over whose route it entitles the holder to be carried. The presumption is that the carrier who sells the tickets, nothing else appearing, sells them as the agent of the other lines, and the coupons are regarded and treated as the contracts of the respective carriers precisely as if they had been sold by the carriers themselves instead of by the common agent. Hutch. Carr. § 152, and note. Even in this view, it would not follow that the liability of the carriers for the passenger's baggage would be the same, or governed by the same rule as the liability for the passenger. The reason is obvious. There can never be any doubt as to the carrier by whose fault the passenger is injured, or the personal contract with him violated. While, on the other hand, there may be the same difficulty in ascertaining the carrier at fault in regard to baggage as in the case of ordinary freight. We are of opinion, therefore, that the carrier contracting to carry the baggage of a passenger by checking it to a given point becomes liable by the contract for its safe carriage, in the same way and to the same extent as the carrier of goods. The check is in legal effect a bill of lading for the baggage.

In this view, upon the finding of the trial judge that the loss occurred before reaching Omaha, the defendant became liable to the plaintiff for the value of the property taken from the trunks of the plaintiff. It is equally clear that the Union and Central Pacific Railroad Companies, whose roads lay beyond Omaha, were not liable to the plaintiff for the loss, nor in any way in default. Not being co-wrongdoers with the defendant, no payment made by them to the plaintiff, and no release, in consideration of such payment, made by the plaintiff to them, could operate as a release of the liability of the defendant. And the transaction can only be treated as the compromise of a possible litigation, or as a mere gratuity. It would meet the abstract equity of the case to give the defendant the benefit of a credit for the value of the deduction on the return tickets over the roads of those companies, but no principle has been suggested by counsel, or occurred to us, upon which the allowance can be made.

There is no error in the judgment, and it must be affirmed.

Round-trip tourist ticket. Varying by parol. Provision for stamping and identification. No agent to be found to stamp it. Connecting lines. First carrier stipulating not to be liable beyond its line. Admissions by demurrer. Matter of law. Waiver of conditions by conductor.

MOSHER v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.

(127 U. S. 390, 8 Sup. Ct. 1324.)

Supreme Court of the United States. May 14, 1888.

In error to the circuit court of the United States for the Eastern district of Missouri.

This was an action by a passenger against a railroad corporation for putting him off one of its trains. The allegations of the amended petition were in substance as follows: On April 9, 1883, the plaintiff purchased of the defendant, at St. Louis, a ticket expressed on its face to be "good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on back hereof, and presented with coupons attached," and containing a "tourist's contract," signed by the plaintiff, as well as by the ticket agent, by which, "in consideration of the reduced rate at which this ticket is sold," the plaintiff agreed, "with the several companies" over whose lines the ticket entitled him to be carried, upon certain terms and conditions, of which those material to be here stated were as follows: "(1) That in selling this ticket the St. Louis, Iron Mountain & Southern Railway Company acts only as agent, and is not responsible beyond its own line;" "(4) that it is good for going passage only five (5) days from the date of sale, as stamped on back and written below; (5) that it is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark., within eighty-five (85) days from date of sale; and, when officially signed and dated in ink and duly stamped by said agent, this ticket shall then be good only five (5) days from such date; (6) that I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads, and on my failure or refusal that this ticket shall become thereafter void;" "(12) and it is expressly agreed and understood by me that no agent or employé of any of the lines named in this ticket has any power to alter, modify, or waive in any manner any of the conditions named in this contract." Attached to the ticket were various coupons, a portion of which entitled the plaintiff to be carried from Malvern to Hot Springs and back on the Hot Springs Railroad. The plaintiff was accordingly carried as a passenger from St. Louis to Hot Springs. On May 9, 1883, the plaintiff, desiring to return to St. Louis, "presented himself and said ticket at the business and ticket office and depot of said Hot Springs Railroad, the said business and ticket office and depot being then and there the business office of the authorized agent of said Hot Springs Railroad, at said Hot Springs, during business hours, and a reasonable time before the time of departure of its train for St. Louis that the plaintiff desired to take and did take," and offered to identify himself as the original purchaser of the ticket to the satisfaction of said agent, for the purpose of entitling himself to return thereon to St. Louis, and of permitting the ticket to be officially signed, dated in ink, and duly stamped by said agent; but the defendant and the Hot Springs Railroad Company failed to have said agent there at any time between the time when the plaintiff so presented himself and his ticket and the time of departure of the train, "whereby," the petition averred, "said defendant and its agent, and the agent of said Hot Springs Railroad at Hot Springs, Ark., failed and refused, without any just cause or excuse, to identify the plaintiff as the original purchaser of said ticket, or to officially sign, date in ink, and stamp said ticket." The plaintiff thereupon boarded the train of the Hot Springs Railroad at Hot Springs, and was carried thereby to Malvern, where, on the same day, he boarded a regular passenger train of the defendant for St. Louis, and, upon the conductor thereof demanding his fare, presented his ticket, informed him of his presentation of it at the office at Hot Springs, of his offer there to identify himself, and of the absence of the agent, as aforesaid, and offered to sign his name, and otherwise identify himself to the conductor, and demanded to be carried to St. Louis by virtue of said ticket; but the conductor refused, and put him off the train, and left him at a way station, where he was obliged to remain, without fire or other protection against the cold, until he took the midnight train of the defendant for St. Louis, first paying fare; "by reason of each and all of which wrongful and unlawful acts aforesaid of defendant, its agents and employés, the plaintiff says he has been damaged in the sum of ten thousand dollars, for which he asks judgment." The circuit court sustained a demurrer to this petition, and gave judgment for the defendant. Its opinion delivered upon sustaining this demurrer, and sent up with the record, is reported in 23 Fed. 326; and its opinion at a former stage of the case, in 5 McCrary, 462, and in 17 Fed. 880.

Clinton Rowell, for plaintiff in error. John F. Dillon and Winslow S. Pierce, Jr., for defendant in error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

The right of this plaintiff to be carried upon the defendant's train, without paying additional fare, does not depend upon his having been received as an ordinary passenger, or upon any representations made by a ticket

seller, conductor, or other officer of the company as to his right to use a ticket, but wholly upon the construction and effect of the written contract, signed by him, upon the face of the ticket (of the kind called "tourist's" or "round-trip" tickets) sold him by the defendant for a passage to Hot Springs, and back, by which, in consideration of a reduced rate of fare, he agreed to the following terms: By the fifth condition the ticket "is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark., within eighty-five days from date of sale; and, when officially signed and dated in ink and duly stamped by said agent, this ticket shall then be good only five days from such date." The clear meaning of this condition is that the ticket shall not be good for a return passage at all, unless, within 85 days from its original date, the holder not only identifies himself as the original purchaser to the satisfaction of the agent named, but that agent signs, dates, and stamps the ticket; and that, upon such identification and stamping, the ticket shall be good for five days from the new date. The sixth condition, by which the ticket is to be void if the plaintiff does not sign his name, and otherwise identify himself, whenever called upon so to do by any conductor or agent of either of the lines over which he may pass, is evidently intended as an additional precaution against a transfer of the ticket either in going or in returning, and not as an alternative or substitute for the previous condition to the validity of the ticket for a return trip. The twelfth condition states that the plaintiff understands and expressly agrees that no agent or employé of any of the lines has any power to alter, modify, or waive any of the conditions of the contract. By the express contract between the parties, therefore, the plaintiff had no right to a return passage under the ticket, unless it bore the stamp of the agent at Hot Springs. Such a stamp was made by the contract a condition precedent to the right to a return passage, and no agent or employé of the defendant was authorized to waive that condition. The plaintiff contends that, as there was no agent at the office at Hot Springs, to whose satisfaction he could identify himself, and by whom he could have his ticket stamped, when he presented himself with his ticket at that office, within a reasonable time before he took the return train, he had the right to be carried from Hot Springs to St. Louis under his ticket without having it stamped, and may therefore maintain this action against the defendant for the act of its conductor in expelling him from the connecting train upon the defendant's road. If this defendant had been the party responsible for not having an agent at Hot Springs, the question thus presented would have been of some difficulty, although we are not prepared to hold that, even under such circumstances, the plaintiff's remedy would not be limited to an action for the breach of the implied contract to have an agent there, and to the expense which he thereby incurred. But this case does not require the expression of any opinion upon that question. By the first condition of the contract contained in the plaintiff's ticket, the defendant is not responsible beyond its own line. Consequently it was not responsible to the plaintiff for failing to have an agent at the further end of the Hot Springs Railroad. The agent who was to identify the passenger, and stamp his ticket there, was the agent of the Hot Springs Railroad Company, and is so described in the ticket, as well as in the petition. If there was any duty to have an agent at Hot Springs, it was the duty of that company, and not of the defendant. The demurrer admits only the facts alleged, and does not admit the conclusion of law, inserted in the petition, that by reason of the facts previously set forth, and which do not support the conclusion, the defendant and its agent failed and refused, without just cause or excuse, to identify the plaintiff as the original purchaser of the ticket, or to sign, date, and stamp it. Hitchcock v. Buchanan, 105 U. S. 416. The omission to have an agent at Hot Springs not being a breach of contract or of duty on the part of this defendant, the case is relieved of all difficulty. The conductor of the defendant's train, upon the plaintiff's presenting a ticket bearing no stamp of the agent at Hot Springs, had no authority to waive any condition of the contract, to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train. It would be inconsistent alike with the express terms of the contract of the parties, and with the proper performance of the duties of the conductor, in examining the tickets of other passengers, and in conducting his train with due regard to speed and safety, that he should undertake to determine, from oral statements of the passengers or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract on the face of the ticket made the stamp of the agent of the Hot Springs Railroad Company at Hot Springs the only and conclusive proof.

The necessary conclusion is that the plaintiff cannot maintain this action against the defendant for the act of its conductor in putting him off the train. Townsend v. Railroad Co., 56 N. Y. 295; Shelton v. Railway Co., 29 Ohio St. 214; Frederick v. Railroad Co., 37 Mich. 342; Bradshaw v. Railroad Co., 135 Mass. 407; Murdock v. Railroad Co., 137 Mass. 293, 299; Railroad Co. v. Fleming, 14 Lea, 128. Judgment affirmed.

Exemplary damages for act of conductor. Question of general jurisprudence. Wantonness. Company not personally implicated.

LAKE SHORE & MICHIGAN SOUTHERN RY. CO. v. PRENTICE.

(147 U. S. 101, 13 Sup. Ct. 261.)

United States Supreme Court. Jan. 3, 1893.

In error to the circuit court of the United States for the northern district of Illinois.

Action by Chalmer M. C. Prentice against the Lake Shore & Michigan Southern Railway Company to recover damages for unlawful arrest of plaintiff, while a passenger, by the conductor of one of the company's trains. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Statement by Mr. Justice GRAY:

This was an action of trespass on the case, brought October 19, 1886, in the circuit court of the United States for the northern district of Illinois, by Prentice, a citizen of Ohio, against the Lake Shore & Michigan Southern Railway Company, a corporation of Illinois, to recover damages for the wrongful acts of the defendant's servants.

The declaration alleged, and the evidence introduced at the trial tended to prove, the following facts: The plaintiff was a physician. The defendant was engaged in operating a railroad, and conducting the business of a common carrier of passengers and freight, through Ohio, Indiana, Illinois, and other states. On October 12, 1886, the plaintiff, his wife, and a number of other persons were passengers, holding excursion tickets, on a regular passenger train of the defendant's railroad, from Norwalk, in Ohio, to Chicago, in Illinois. During the journey the plaintiff purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable. The conductor of the train, learning this, and knowing that the plaintiff had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer, an employe of the defendant, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the plaintiff, and rudely searched him for weapons, in the presence of the other passengers, hurried him into another car, and there sat down by him as a watch, and refused to tell him the cause of his arrest, or to let him speak to his wife. While the plaintiff was being removed into the other car, the conductor, for the purpose of disgracing and humiliating him with his fellow passengers, openly declared that he was under arrest, and sneeringly said to the plaintiff's wife, "Where's your doctor now?" On arrival at Chicago, the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train, or to give her the check for their trunk; and, in the presence of the passengers and others, ordered him to be taken ti the station house, and he was forcibly taken there, and detained until the conductor arrived; and, knowing that the plaintiff had been guilty of no offense, entered a false charge against him of disorderly conduct, upon which he gave bail and was released, and of which, on appearing before a justice of the peace for trial on the next day, and no one appearing to prosecute him, he was finally discharged.

The declaration alleged that all these acts were done by the defendant's agents in the line of their employment, and that the defendant was legally responsible therefor; and that the plaintiff had been thereby put to expense, and greatly injured in mind, body, and reputation.

At the trial, and before the introduction of any evidence, the defendant, by its counsel, admitted "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor;" but afterwards excepted to each of the following instructions given by the circuit judge to the jury:

"If you believe the statements which have been made by the plaintiff and the witnesses who testified in his behalf, (and they are not denied,) then he is entitled to a verdict which will fully compensate him for the injuries which he sustained, and in compensating him you are authorized to go beyond the amount that he has actually expended in employing counsel; you may go beyond the actual outlay in money which he has made. He was arrested publicly, without a warrant, and without cause; and if such conduct as has been detailed before you occurred, such as the remark that was addressed by the conductor to the wife in the plaintiff's presence, in compensating him you have a right to consider the humiliation of feeling to which he was thus publicly subjected. If the company, without reason, by its unlawful and oppressive act, subjected him to this public humiliation, and thereby outraged his feelings, he is entitled to compensation for that injury and mental anguish."

"I am not able to give you any rule by which you can determine that; but, bear in mind, it is strictly on the line of compensation. The plaintiff is entitled to compensation in money for humiliation of feeling and spirit, as well as the actual outlay which he has made in and about this suit."

"And, further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called 'smart money,' if you are satisfied that the conductor's conduct was illegal, (and it was illegal,) wanton, and oppressive. How much that shall be the court cannot tell you. You must act as reasonable men, and not indulge vindictive feelings towards the defendant."

"If a public corporation, like an individual,

acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power."

The jury returned a verdict for the plaintiff in the sum of $10,000. The defendant moved for a new trial, for error in law, and for excessive damages. The plaintiff thereupon, by leave of court, remitted the sum of $4,000, and asked that judgment be entered for $6,000. The court then denied the motion for a new trial, and gave judgment for the plaintiff for $6,000. The defendant sued out this writ of error.

Geo. C. Greene, for plaintiff in error. W. A. Foster, for defendant in error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers,—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment,—is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states. Railroad Co. v. Lockwood, 17 Wall. 357, 368; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443, 9 Sup. Ct. Rep. 469; Myrick v. Railroad Co., 107 U. S. 102, 109, 1 Sup. Ct. Rep. 425; Hough v. Railway Co., 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment, under general warrants of the secretary of state, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the chief justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Wilkes v. Wood, Lofft, 1, 18, 19, 19 Howell, St. T. 1153, 1167, See, also, Huckle v. Money, 2 Wils. 205, 207; Sayer, Dam. 218. 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559; Day v. Woodworth, 13 How. 363, 371; Railroad Co. v. Quigley, 21 How. 202, 213, 214; Railway Co. v. Arms, 91 U. S. 489, 493, 495; Railway Co. v. Humes, 115 U. S. 512, 521, 6 Sup. Ct. Rep. 110; Barry v. Edmunds, 116 U. S. 550, 562, 563, 6 Sup. Ct. Rep. 501; Railway Co. v. Harris, 122 U. S. 597, 609. 610, 7 Sup. Ct. Rep. 1286; Railway Co. v. Beckwith, 129 U. S. 26, 36, 9 Sup. Ct. Rep. 207.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of The Amiable Nancy, 3 Wheat. 546.

In that case, upon a libel in admiralty by the owner, master, supercargo, and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew, Mr. Justice Story, speaking for the court, in 1818, laid down the general rule as to the liability for exemplary or vindictive damages by way of punishment, as follows: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by

them; and, if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages." 3 Wheat. 558, 559.

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. Manufacturing Co. v. Fiske, 2 Mason, 119, 121.[1] In Keene v. Lizardi, 8 La. 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are The State Rights, Crabbe, 42, 47, 48; The Golden Gate, McAll. 104; Wardrobe v. Stage Co., 7 Cal. 118; Boulard v. Calhoun, 13 La. Ann. 445; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Grund v. Van Vleck, 69 Ill. 478, 481; Becker v. Dupree, 75 Ill. 167; Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. Rep. 93; Kirksey v. Jones, 7 Ala. 622, 629; Pollock v. Gantt, 69 Ala. 373, 379; Eviston v. Cramer, 57 Wis. 570, 15 N. W. Rep. 760; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. Rep. 488; McCarthy v. De Armit, 99 Pa. St. 63, 72; Clark v. Newsam, 1 Exch. 131, 140; Clissold v. Machell, 26 U. C. Q. B. 422.

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances. Railroad Co. v. Quigley, 21 How. 202, 210; Bank v. Graham, 100 U. S. 699, 702; Salt Lake City v. Hollister, 118 U. S. 256, 261, 6 Sup. Ct. Rep. 1055; Railway Co. v. Harris, 122 U. S. 597, 608, 7 Sup. Ct. Rep. 1286.

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. Railroad Co. v. Derby, 14 How. 468; Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. Rep. 1039; Howe v. Newmarch, 12 Allen, 49; Ramsden v. Railroad Co., 104 Mass. 117. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. Railroad Co. v. Quigley, 21 How. 202, 211; Salt Lake City v. Hollister, 118 U. S. 256, 262, 6 Sup. Ct. Rep. 1055; Reed v. Bank, 130 Mass. 443, 445, and cases cited; Krulevitz v. Railroad Co., 140 Mass. 573, 5 N. E. Rep. 500; McDermott v. Journal, 43 N. J. Law, 488, and 44 N. J. Law, 430; Bank v. Owston, 4 App. Cas. 270. But, as well observed by Mr. Justice Field, now chief justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." Lothrop v. Adams, 133 Mass. 471, 480, 481.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In Detroit Daily Post Co. v. McArthur, in Eviston v. Cramer, and in Haines v. Schultz, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in Haines v. Schultz the supreme court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground,—wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive, cannot be permitted to take the place of evidence, without leading to a most dangerous

[1] Fed Cas. No. 1,681.

extension of the doctrine respondeat superior." 50 N. J. Law, 484, 485, 14 Atl. Rep. 488. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and, where it has been held that he can, it is admitted to be an anomaly in the criminal law. Com. v. Morgan, 107 Mass. 199, 203; Reg. v. Holbrook, 3 Q. B. Div. 60, 63, 64, 70, 4 Q. B. Div. 42, 51, 60.

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. Railroad Co. v. Quigley, Railway Co. v. Arms, and Railway Co. v. Harris, above cited; Caldwell v. Steamboat Co., 47 N. Y. 282; Bell v. Railway Co., 10 C. B. (N. S.) 287, 4 Law T. (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. Rep. 696; Meagher v. Driscoll, 99 Mass. 281, 285; Smith v. Holcomb, Id. 552; Hawes v. Knowles, 114 Mass. 518; Campbell v. Car Co., 42 Fed. Rep. 484.

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor," the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the jury that, "after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called 'smart money,'" if they were "satisfied that the conductor's conduct was illegal, wanton, and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents.

In Railroad Co. v. Derby, which was an action by a passenger against a railroad corporation for a personal injury suffered through the negligence of its servants, the jury were instructed that "the damages, if any were recoverable, are to be confined to the direct and immediate consequences of the injury sustained;" and no exception was taken to this instruction. 14 How. 470, 471.

In Railroad Co. v. Quigley, which was an action against a railroad corporation for a libel published by its agents, the jury returned a verdict for the plaintiff under an instruction that "they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to the plaintiff, and act as an adequate punishment to the defendant." This court set aside the verdict, because the instruction given to the jury did not accurately define the measure of the defendant's liability; and, speaking by Mr. Justice Campbell, stated the rules applicable to the case in these words: "For acts done by the agents of the corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants." 21 How. 210, 213, 214.

In Railway Co. v. Arms, which was an action against a railroad corporation, by a passenger injured in a collision caused by the negligence of the servants of the corporation, the jury were instructed thus: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." This court, speaking by Mr. Justice Davis, and approving and applying the rule of exemplary damages, as stated in Quigley's case, held that this was a misdirection, and that the failure of the employes to use the care that was required to avoid the accident, "whether called 'gross' or 'ordinary' negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind

can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury." 91 U. S. 495.

In Railway Co. v. Harris, the railroad company, as the record showed, by an armed force of several hundred men, acting as its agents and employes, and organized and commanded by its vice president and assistant general manager, attacked with deadly weapons the agents and employes of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who thereupon brought an action against the corporation, and recovered a verdict and judgment under an instruction that the jury "were not limited to compensatory damages, but could give punitive or exemplary damages, if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff." This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in Quigley's case, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. 122 U. S. 610, 7 Sup. Ct. Rep. 1286.

The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself; but the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards chief justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." This instruction was held to be right, for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done, upon evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual, ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty." "Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." Hagan v. Railroad Co., 3 R. I. 88, 91.

The like view was expressed by the court of appeals of New York, in an action brought against a railroad corporation by a passenger for injuries suffered by the neglect of a switchman, who was intoxicated at the time of the accident. It was held that evidence that the switchman was a man of intemperate habits, which was known to the agent of the company having the power to employ and discharge him and other subordinates, was competent to support a claim for exemplary damages, but that a direction to the jury in general terms that in awarding damages they might add to full compensation for the injury "such sum for exemplary damages as the case calls for, depending in a great measure, of course, upon the conduct of the defendant," entitled the defendant to a new trial; and Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless, and of a criminal nature, and

clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." Cleghorn v. Railroad Co., 56 N. Y. 44, 47, 48.

Similar decisions, denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas, and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the western and southern states. But of the three leading cases on that side of the question, Hopkins v. Railroad Co., 36 N. H. 9, can hardly be reconciled with the later decisions in Fay v. Parker, 53 N. H. 342, and Bixby v. Dunlap, 56 N. H. 456; and in Goddard v. Railway Co., 57 Maine, 202, 228, and Railway Co. v. Dunn, 19 Ohio St. 162, 590, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedg. Dam. (8th Ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages; but the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial.

Mr. Justice FIELD, Mr. Justice HARLAN, and Mr. Justice LAMAR took no part in this decision.

See, as to the federal doctrine of a general American commercial law, Forepaugh v. Delaware, Lackawanna & Western R. R. Co. (1889) 128 Pa. St. 207, 18 Atl. 503; Faulkner v. Hart (1880) 82 N. Y. 413.

Presumption of negligence, when drawn from occurrence of accident. Omission of court to call attention of jury to material points. Questions not raised on trial.

HERSTINE v. LEHIGH VALLEY R. R. CO.

(151 Pa. St. 244, 25 Atl. 104.)

Supreme Court of Pennsylvania. Oct. 3, 1892.

Appeal from court of common pleas, Northampton county; Schuyler, Judge.

Action by George R. Herstine against the Lehigh Valley Railroad Company for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

J. Davis Brodhead, Wm. Fackentaal, Francis I. Gowen, and Robt. E. Wright, for appellant. T. F. Emmens and A. B. Longaker, for appellee.

WILLIAMS, J. The appellant, the defendant in the court below, is a common carrier. The plaintiff was, at the time of the alleged injury, a passenger upon one of the defendant's trains. The train was at the time standing upon the east-bound track, a short distance below the station at South Bethlehem, waiting for another car to be attached to it. This car, as the plaintiff alleges, was run out of a sidiug near by, and allowed to drop by gravity down to and against the rear end of the train with such violence that his wife and himself were thrown forward from their seats against the seat in front of them, and his spine seriously and permanently injured by the wrench which the blow of the descending car upon the standing train gave him. No complaint was made to the train hands or employés of the company at the time, nor for several months afterwards, but the plaintiff continued work at his trade during a considerable portion of the time, though, as he says, with frequent interruptions, and with more or less pain. This action was brought to recover damages for the injury on the ground that the coupling was violently and negligently made, and that the negligence of the defendant's employés was the cause of the plaintiff's injury. The defendant denied that the coupling was violently or negligently made; denied that the plaintiff suffered any injury by reason of it, or while a passenger upon the train; and alleged that his condition at the time of the trial was due in part to disease from which he had previously sufferecl, and for which he had been treated by physicians, and in part to malingering, or the simulation of symptoms of a disease from which he had never suffered. Two issues of fact were thus raised: First. Was the coupling violent and negligent, as the plaintiff alleged? Second. If negligence be found by the jury, was the plaintiff injured, and to what extent, as the result of such negligence? The plaintiff had the affirmative, and he was bound to prove the negligence of the defendant, and that the injury complained of was caused by it. Upon this subject the learned trial judge instructed the jury, in substance, that the rule of Laing v. Colder, 8 Pa. St. 479, was applicable to this case, so that "from the mere happening of an injurious accident a presumption of neglect arises prima facie, and throws the onus of showing that it did not exist on the carrier." This was misleading. There was no allegation that any accident had occurred to the train, or to any of the instruments or appliances of transportation. All that was alleged was that in the performance of the duty of coupling an additional car to the train the defendant's employés had negligently permitted the car to strike the train with more violence than was necessary to move the springs and effect the coupling. This was stoutly denied by the defendant and by the persons in charge of the car and the train at the time. Whether it was so or not was the subject of controversy. The primary question of fact was for the jury to determine, since the plaintiff was left without a cause of action if the coupling was made in a proper manner. Upon this question the burden of establishing the negligence was on the plaintiff. There was no legal presumption arising from the facts of this case to shift the burden of proof. It is now well settled that the rule in Laing v. Colder is applicable to cases where a passenger is injured in, or because of, an accident happening to the train, boat, or other means of transportation. The reason of the rule in such cases is that a contract to carry is, within the understanding of both parties, a contract to carry safely; and a breach of this contract by reason of the failure or insufficiency of any of the means provided for the carriage puts the carrier upon the defensive. The construction of its roads, cars, and boats, and their management and care, are subjects peculiarly within the knowledge of the carrier, and with which the passenger has no means of becoming familiar. When an accident occurs, therefore, the presumption is that it is due to the want of care in construction, repair, or management, and the burden of showing its own freedom from fault is on the carrier. But an accident to a passenger while about the premises of the carrier raises no such presumption, (Hayman v. Railroad Co., 118 Pa. St. 508, 11 Atl. 815;) nor does an accident befalling a passenger while on board a train, and in the course of his journey, unless it is connected in some way with the means of transportation, (Railroad Co. v. MacKinney, 124 Pa. St. 462, 17 Atl. 14.) Where the injury is chargeable to the manner of construction of a car, the rule does not apply if the accident is to the passenger, and not to the car. Farley v. Traction Co., 132 Pa. St. 58, 8 Atl. 1090; Spear v. Railroad Co., 119 Pa. St. 61, 12 Atl. 824, is in entire harmony with the cases just cited. In that case the means of carriage was a steamboat. The plaintiff was a passenger. An explosion oc-

curred which shattered one end of the boat, and inflicted the injury complained of upon Spear. This was a case for the application of the rule. The duty of showing that the explosion occurred without the fault of the company was imposed by the presumption of negligence arising from the fact of the explosion upon its boat, which was under the care of and navigated by its employés. The ninth assignment is, for the reason now given, sustained.

The defense as to the second question—the injury to the plaintiff—rested largely on the medical testimony introduced for the purpose of satisfying the jury that the plaintiff's condition was due to disease, and not to the jar resulting from the coupling. The expert testimony on both sides related mainly to this question. An adequate presentation of the case to the jury could not be made without at least directing their attention to this question as one to be considered and determined by them. If the defendant's position upon the subject was sustained by the evidence, the existence of negligence in effecting the coupling was rendered immaterial. For this reason the seventh assignment of error is sustained.

An examination of the testimony shows that the existence of violence or negligence in making the coupling, and the relation of such violence or negligence, if it existed, to the plaintiff's condition, depended almost entirely on the testimony of the plaintiff and his wife. His credibility was attacked, and many witnesses were called to show that his reputation for truth and veracity was bad. By way of rebuttal, the plaintiff called many witnesses to sustain his character. His credibility therefore became an important question in the cause. It was a question for the jury. If the testimony of Herstine was not entitled to credit, the jury would probably have found the weight of the evidence was against the existence of unusual violence in the coupling of the car to the train, and therefore against the plaintiff's right to recover, no matter what may have been the origin of his spinal troubles. But the learned judge gave the jury no instruction upon this subject. He did not so much as allude to the fact that the plaintiff's credibility was attacked. This might work no injustice in a case where the testimony of the witness attacked is so sustained that the case may well stand without him; but where his testimony is so important that the case may turn upon it, and especially when his credibility is attacked by the testimony of witnesses called to impeach him, and by his own conduct in failing for many months to complain of the coupling or of an injury received on account of it, the credibility of the witness becomes one of the controlling questions of fact to which the attention of the jury should be particularly called. The appellee urges that because the learned judge was not asked to instruct the jury upon this question, and that which is the subject of the seventh assignment, the failure to do so cannot be regarded as error; and cites Fox v. Fox, 96 Pa. St. 60, and similar cases, in support of his position. Fox v. Fox was an action on the case for malicious prosecution. On the trial the parties seem to have treated the question of probable cause as one for the jury, and the trial judge submitted it to them. After verdict and judgment it was urged in this court that the question of the existence of probable cause was, upon all the evidence, a question of law for the court; and we were asked to reverse the court below for that reason. This we declined to do, because the question had not been raised on the trial. The same question was presented in Buckholder v. Stahl, 58 Pa. St. 371. If the legal questions that might be raised upon the trial are not raised, it is too late to raise them on appeal to this court. This we have repeatedly said, and we have given as a reason that it is neither fair to the successful party nor to the court to disturb a verdict that has been reached by a mode of trial to which both parties were assenting. We have not said, however, that it is the duty of the parties to make specific requests for the submission of the several questions of fact raised upon the trial, or that a failure so to do deprives the party affected by the omission of the right to complain that his defense has been ignored or forgotten in the submission of the case to the jury. We must for this reason sustain the eighth assignment of error. The judgment is reversed, and a venire facias de novo is awarded.

Riding on platform is prima facie negligence. Alighting from moving train. Street car. Overcrowding of car.

WORTHINGTON v. CENTRAL VERMONT R. R. CO.

(64 Vt. 107, 23 Atl. 590.)

Supreme Court of Vermont, General Term. Jan. 8, 1892.

Exceptions from Rutland county court; MUNSON, Judge.

Case by W. R. Worthington against the Central Vermont Railroad Company. Judgment for plaintiff. Defendant excepts. Reversed.

Plaintiff was injured by falling from the platform of one of defendant's cars while the train was in motion. The train was an excursion train, which had left Rutland on the morning of the accident, and was to run to Burlington. The accident occurred a few miles beyond Middlebury. The day was pleasant, and the excursion was unusually large. Plaintiff took the train at Rutland, where there was ample room, and where he obtained a seat, with his wife and family. This seat he continued to occupy until after the train left Middlebury. At the intervening stations between Rutland and Middlebury the cars filled up so that, on leaving Middlebury, they were badly overloaded. The evidence of plaintiff tended to show that the seats in all the cars were occupied, and that many people were standing upon the platforms and in the aisles. After the train left Middlebury, plaintiff gave his seat to a lady who was standing beside him in the aisle, and stood up in her place. After standing there for a few moments, he went out and took his stand upon the forward platform of the car next behind the one in which he had been riding, standing either upon the platform, or upon the step,—he did not clearly remember which,—with his back towards the car, and holding on by the iron rod behind him. While in this position he was either thrown or fell from the car. Both the platforms were filled with people, no one of whom saw him when he began to fall, and only one of whom saw him after he was free from the car. No one else was injured during the trip. Plaintiff could not remember how he happened to fall. With reference to how he happened to be upon the platform, plaintiff testified that the car in which he was riding was crowded; that the seats were all full; that the aisle was full; and that some persons were standing upon the platform. After giving his seat to the lady, he stood for a few moments in the aisle; but the motion of the train was such that he was thrown and jostled against other persons standing near him in the aisle, most of whom were ladies, to such an extent as to render his position there one of discomfort to himself and evident annoyance to others. Thereupon it occurred to him that he would go into the smoking-car, and endeavor to obtain a seat there. For this purpose he left the place where he was standing, passed out upon and across the rear platform of that car, and onto the forward platform of the next car. Arriving there, the car was so crowded that it became evident to him that it would do no good to go any further, and he accordingly took up the position which he was occupying when injured, thinking that he would remain there for a short time, and then return to his former position inside the car.

Geo. E. Lawrence, for plaintiff. *C. A. Prouty*, for defendant.

ROWELL, J. If, as matter of law, it was *prima facie* negligence for the plaintiff to be riding on the platform or the steps, as shown by the case, and if his riding there contributed to his injury, then the burden was on him to show that he was riding there for a reason that freed him from the imputation of negligence; and, if the testimony did not tend to show such reason, he had no case for the jury, and the court should have directed a verdict against him. It is sometimes said that, when the facts are conceded or undisputed, the question of negligence is for the court, and not for the jury. But this must not be taken in its broadest sense, and as universally true, but with limitation. When the law prescribes what shall constitute negligence, or when the act relied upon to show negligence is isolated, then negligence becomes a question of law. But when the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only, when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it,—no room for opposing inferences. This is clearly shown by the adjudged cases. Thus in Briggs v. Taylor, 28 Vt. 180, it was regarded as so certain that carriages and sleds would be injured by standing outdoors all winter that the court ruled, as matter of law, that thus leaving them was negligence. But in Vincent v. Schwab, 32 Vt. 612, it is said that, although there is no conflict in the testimony in respect of negligence, yet, if it still rests upon discretion, judgment, and experience, it is a matter of law, and not of fact; and in Whitcomb v. Denio, 52 Vt. 382, it is said that, whatever the rule may be in other states when the facts are undisputed in this state, when the question is whether a thing has been done within a reasonable time or with reasonable care, or when any other fact is to be determined that involves the judgment of the trior upon an existing state of facts and circumstances, the almost universal practice has been to submit the question to the jury. In Hunter v. Railroad Co., 112 N. Y. 371, 19 N. E. Rep. 820, it was held that the plaintiff, who was *sui juris* and in the full possession of his faculties, with nothing to disturb his judgment, was guilty of negligence, as matter of law, in attempting to board a railroad train moving at the rate of from four to six miles an hour, and that the question did not become one of fact by the conductor's calling out to him to get on. That it was a dangerous and hazardous attempt, the court said, must be the judgment of all men; that persons are taught, from their earliest youth, the great danger attending an attempt to

board or to leave a train while in motion; and that no person of mature years and judgment but has the knowledge that such an attempt is dangerous in the highest degree. But the court said that there may be cases in which such an attempt would not be regarded as negligence as matter of law, and where the question of negligence, upon all the facts in the case, should be submitted to the jury: and referred to Filer v. Railroad Co., 49 N. Y. 47, as such a case. In Solomon v. Railroad Co., 103 N. Y. 437, 9 N. E. Rep. 430, it is said that the rule established by the decisions is that it is presumptively a negligent act for a passenger to attempt to alight from a moving train, and that it is not sufficient to rebut the presumption that the trainmen acquiesced in the action of the passenger, nor that the company violated its duty or contract in not stopping the train, nor that to remain on the train would subject the passenger to trouble or inconvenience; but that to excuse such an act, and free the passenger from the charge of contributory negligence, there must be a coercion of circumstances that did not leave the passenger in the free and untrammeled possession of his faculties and judgment. And the court went on to say that, although negligence is usually a fact for the jury, yet the inference of negligence in a given case may be so strong and convincing that the judge may direct a verdict; that the conclusion that it is *prima facie* dangerous to alight from a moving train is founded on our general knowledge and common experience; and that it is akin to the conclusion, now generally accepted, that it is in law a dangerous, and therefore a negligent, act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In Morrison v. Railway Co., 56 N. Y. 302, it was held that the question whether a person has been guilty of contributory negligence, in attempting to alight from a car in motion, is not in every case a question of fact for the jury; that, when the facts are undisputed, the question of contributory negligence may become a question of law; and it was held to be such in that case. FOLGER, J., in delivering the opinion of the court, said: "Can it be said that a person of ordinary care and prudence would have swung himself from a car in motion down to the ground in the dark, laden with the weight of a child twelve years old, having but one hand and one arm to aid himself with, when there was no other danger to be avoided by meeting this, and no incentive to the act other than the inconvenience of being carried by his place of abode, and with a full apprehension of the danger he was about to incur? I think not, and am of the opinion that it is so clear that the law and this court should have answered without calling in the aid of the jury." Gavett v. Railroad Co., 16 Gray, 501, is to the same effect. There it appeared that, after the train started and was in motion, the plaintiff either passed out of the door, and was on the platform of the car for the purpose of attempting to leave it, or was actually stepping from the platform of the car upon that in front of the station. While thus situated she was thrown from the car and injured. The court said that it could not be doubted that the well-known hazards of traveling on railroads, and the unprotected and exposed situation of persons standing on the platform of a car, or attempting to leave it when the train is about to start or is actually in motion, render it unsafe for passengers to place themselves in such a position, and preclude the idea that due care can be exercised under such circumstances. So, riding with one's arm or elbow projecting out of the car window, whereby it is injured, is negligence *per se*, and precludes recovery. Todd v. Railroad Co., 3 Allen, 18. In Railroad Co. v. Watson, 114 Ind. 20, 14 N. E. Rep. 721, and 15 N. E. Rep. 824, it is said that if, from the facts, only one inference can be drawn, and that is that there was negligence, it must be adjudged as matter of law; or, conversely, if it can be clearly affirmed as matter of law that there was no negligence, the court must so declare. In Seefeld v. Railway Co., 70 Wis. 216, 35 N. W. Rep. 278, it is held that when the facts are undisputed, and admit of no doubtful or opposing inferences, the question of negligence is one of law. Many other cases of like import might be cited, but these are quite sufficient to establish the proposition above laid down, namely, that when the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only, when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it,—no room for opposing inferences.

This brings us to consider whether, as matter of law, it was *prima facie* negligence for the plaintiff to be riding on the platform or the step, as shown by the case. He was standing either on the second step or on the edge of the platform, with his back to the saloon window, holding onto the iron on the end of the car. There were notices on the car doors forbidding persons to stand on the platform. The platform was full, and two small boys stood on the steps below him. The train was running at the rate of about 30 miles an hour, at the lowest estimate. Plaintiff's testimony tended to show that it was running much faster that that, and was swaying and jolting badly. There is nothing to show that the plaintiff was not an intelligent man, and in the full possession of his faculties. Add to this the well-known fact that in this state railroads must be built with many and sharp curves, which cause fast-running trains to sway and lurch considerably, however good the track, thereby greatly increasing the danger to one riding on the platforms or steps of cars, or being jolted and thrown off, and can it be doubted that the position the plaintiff occupied was, in the circumstances, one of danger and hazard? We think not; and, because it was one of danger and hazard, it was *prima facie* negligence for him to occupy it.

But the plaintiff claims that the cases, especially in New York, are to a different intent, and hold that it is not *prima facie*

negligence to ride on the platform of steam-cars; and, among others, refers to Willis v. Railroad Co., 34 N. Y. 670, and Werle v. Same, 98 N. Y. 650. But we hardly think it is the law of New York that in no circumstances is it *prima facie* negligence for a passenger to ride on the platform of steam-cars. To be sure, in those cases it was held not to be such negligence for the plaintiffs to ride on the platform in the circumstances disclosed. In Willis' case it was not necessary to say anything about it, for his position neither caused nor contributed to his injury. But still the court said it was not *prima facie* negligence for him to be riding on the platform. And in Nolan v. Railroad Co., 87 N. Y. 63, it is said, *obiter*, that the rule is settled that it is not, even in the case of steam-cars, negligence *per se* for a passenger to stand on the front platform of a moving car. In Werle's case the court said that, while the evidence as to many of the facts was conflicting, it thought there was nothing proved from which the court had a right, as a question of law, to attribute contributory negligence to the deceased, and that the whole case presented simply questions of fact for the consideration of the jury. The fair inference from this is that the court thought there might be a state of facts shown in such a case that would make the question of negligence one of law. In Graville v. Railroad Co., 105 N. Y. 525, 12 N. E. Rep. 51, it is said to be unsafe, as matter of common knowledge, for a passenger to ride on the platform of a running train; and in Clark v. Railroad Co., 36 N. Y. 135, it was held to be *prima facie* negligence for a passenger to ride on the steps of a horse-car; and it was laid down as a principle of law that, when it appears that a passenger was riding upon a car in a place of danger, his negligence is *prima facie* proved, and that the *onus* is on him to rebut the presumption. In Nolan's case it is said, referring to the case last cited, that riding on the steps of a horse-car is a position palpably more dangerous than riding on the platform. But we submit that it is no more dangerous than riding on the platform of a steam-car when the train is in rapid motion. And in Connolly v. Ice Co., 114 N. Y. 104, 21 N. E. Rep. 101, it is said that the fact that a passenger on a horse-car stands on the outer platform, when there is opportunity to take a seat in the car, might, in an action against the railroad company to recover damages for its negligence, constitute a defense in ordinary circumstances. Hence we conclude that in some circumstances it might be held in New York that riding on the platform of steam-cars was *prima facie* negligence. But, if the law of that state is otherwise, we are not disposed to follow it. In Massachusetts the law is, as a general proposition, that standing on the platform of steam-cars when the train is in motion is *prima facie* negligence. In addition to Gavett's case, already referred to, we refer to Hickey v. Railroad Co., 14 Allen, 429. That was a much stronger case for recovery than the one at bar, and yet the defendant had judgment. There the deceased had been riding in the smoking-car, and, just before it was uncoupled to let the rest of the train run slowly into the station, he left it, and, with other passengers, stepped upon the platform of the passenger-car in the rear of it, with the intention of riding to the station in that position. The passenger-car was going about five miles an hour, and ran against the smoker, which had been thrown across the track by a misplaced rail and switch, whereby the deceased received injuries from which he died. The court said that, if an injury happens while the passenger is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care; but that when the plaintiff's own evidence shows he had left the place assigned for passengers, and was occupying an exposed position, and that the injury was due in part to the fact of such position, he must necessarily fail, unless he can also make it appear, upon some ground of necessity or propriety, that his being in that position was consistent with the exercise of proper care and caution on his part; and, as the plaintiff in that case had no testimony tending to show proper care on the part of the intestate, a nonsuit was entered. Although the court does not say in so many words that the deceased was *prima facie* negligent as matter of law, yet that is precisely what the case comes to; and the fact that there was room inside does not touch that question, because the presumption of negligence arises from the position itself, as it is a dangerous position, and one not provided for passengers to occupy while the train is in motion. The necessity or propriety of his being there is an element that comes in later, and for the purpose of rebutting the presumption of negligence; but, if it cannot be shown, the presumption remains, and precludes recovery, if the negligence was contributory.

In Treat v. Railroad Corp., 131 Mass. 371, the plaintiff, on the whole case, did not appear to be one who at his own risk had voluntarily assumed an exposed position not intended for passengers, and therefore the question of contributory negligence was properly left to the jury. Zemp v. Railroad Co., 9 Rich. Law, 84, referred to by plaintiff, is not authority for him. There the plaintiff was standing on the front platform of the rear passenger-car at the time of the injury, which was occasioned by the overturning of the engine when the train was moving from five to eight miles an hour. The whole case depended upon whether the injury was attributable to plaintiff's want of care. The court said that plaintiff's position at the moment of the accident was wrong, but that the proximate cause of the injury was the overturning of the engine; that plaintiff's being on the platform did not necessarily subject him to injury in an overturn, any more than if he had been in the car; but that if he had fallen off the platform when the train was in motion, then he would have been obliged to bear his injury, for then his own act would have been as much the proximate cause as the defendant's negligence. Railroad Co. v. Hoosey, 99 Pa. St.

492, is much in point. There the plaintiff below was a passenger on an excursion train of many cars, which were overcrowded, and the plaintiff and many others were unable to find seats. After searching for a seat, and finding none, plaintiff took a position quite near the edge of the rear platform of one of the cars, and stood with his back to the end window of the car, and rode there, the cars being in rapid motion, till he was jolted off and injured. The court said that he was not only in a position of known danger, but was there voluntarily, and against the rules of the company; that having shown, by his own testimony, that at the critical juncture he was in a position where no one of ordinary prudence should have placed himself, it was incumbent on him to show that he was there from necessity, and not from choice; that the dangerous position on the platform in which he voluntarily placed himself while the cars were in rapid motion was undoubtedly the immediate cause of his being jolted off; that if there had been any testimony from which it could have been reasonably inferred that he was there from necessity, and not from choice, it would have been a question for the jury; but that, in the absence of such evidence, it was error to leave it to the jury to determine whether he was or was not guilty of contributory negligence. The plaintiff was the only person on the train who was injured, and the court said that he ought to have submitted to the inconvenience of standing in the cars. Thus it is seen that, on the authorities, it is clearly maintainable that riding on the platform of steam-cars, in the circumstances disclosed in the case in hand, is *prima facie* negligence as matter of law. The plaintiff was the only person on the train who was injured; and that the position in which he was riding materially contributed to his injury is not, and cannot be, questioned.

It remains to consider whether the testimony tended to show that the plaintiff was riding on the platform or the step, whichever it was, for a reason that freed him from the imputation of negligence. His claim was, as shown by the charge and his testimony, that the passage where he stood after giving up his seat was crowded; that most of those in his vicinity were ladies; that the swaying and the jolting of the cars were such that his position was one of discomfort to himself, and of evident discomfort and annoyance to others; and that in consequence of this he concluded to go to the smoking-car. He testified that, after taking his position on the platform or the step, he thought he would stay there a few minutes, and then go back into the car he had left. Thus it appears that the plaintiff had standing-room in the car, which he might have continued to occupy, but which he chose to leave in order to free himself from discomfort, and others from discomfort and annoyance; and that he remained on the platform or the step in order to obtain temporary relief from that discomfort, intending in a short time to resume his former position in the car, which he might have done. But passengers, especially on excursion trains, must expect more or less discomfort, and must endure it, rather than assume positions of danger and hazard, not provided for their occupancy, for the purpose of avoiding it. Necessity alone can warrant the assumption of such positions. If they are assumed as matter of choice, and they contribute to injury, there can be no recovery. But what would constitute necessity in such cases is not easy to say. It may, perhaps, be safely said, in a case like this, when nothing is said or done by those in charge of the train to control or influence the conduct of the passenger, that the attendant circumstances must be such as not to leave the passenger free to choose; such as to coerce his action, and to compel him to assume the position as the best he could do at the time, acting as a careful and prudent man. The testimony in this case did not tend to show any such coercion of circumstances,—any such compulsion; and therefore the case is that the plaintiff was riding as matter of choice, and not of necessity, in a dangerous place, not provided for the occupancy of passengers, which contributed to his injury; hence the court should have directed a verdict against him.

The record discloses another error. The court submitted to the jury, as one element bearing on the question of defendant's negligence in operating the train, the fact that there were but two brakemen upon it, although there was nothing tending to show that the train was in any respect improperly operated for lack of brakemen. It is a familiar rule that it is not proper to submit to the jury an issue that the testimony does not raise. There are no other points of exception that we deem it important to consider.

The case will be remanded, as the issues joined to the jury stand undisposed of on the record, and upon them the plaintiff has a right, and may desire, to introduce additional evidence, and we cannot say that no such evidence exists. Judgment reversed, and cause remanded.

START and THOMPSON, JJ., did not sit, having been of counsel.

Approved in Goodwin v. Boston & Maine R. R., 84 Me. 203, 24 Atl. 816.

Boarding moving train at invitation of conductor. Question of law. Nonsuit.

HUNTER et al. v. COOPERSTOWN & SUSQUEHANNA VALLEY R. R. CO.

(112 N. Y. 371, 19 N. E. 280.)

Court of Appeals of New York. Feb. 8, 1889.

Appeal from supreme court, general term, Fourth department.

Action by Delora M. Hunter and another, as administrators, etc., against the Cooperstown & Susquehanna Valley Railroad Company, for damages for the death of plaintiffs' decedent. Judgment for plaintiffs was reversed by the general term, and a second judgment for plaintiffs was affirmed, and defendant appeals.

E. M. Harris, for appellant. James A. Lynes, for respondents.

PECKHAM, J. Accepting the facts as testified to on the part of the plaintiff in this action, it appears that on the 25th day of September, 1884, the plaintiffs' decedent came to the station of the defendant called "Phœnix Mills," in the early morning, for the purpose of taking a train to the neighboring village of Oneonta. There was a platform in front of the station, the northern end of which was used for freight, and was two or three feet higher than the southern end, which was used more especially for passengers. The passenger portion of the platform was only about one foot above the ground, and communication between the upper and lower platforms was had by steps leading from one to the other. The top of the freight platform was four and one-half feet higher than the rails of the defendant's road. At the north end of the freight platform the distance between it and a car, as it would pass along the track, would be six inches. At the center of the freight platform it would be four inches, and the same distance at the south end.

The plaintiffs' decedent, upon hearing the whistle of a train approaching from the north on its way towards Oneonta, got up and stood on the passenger portion of the platform, awaiting its arrival; and, when it had got within a short distance of the station, the conductor came out onto the platform of the rear passenger car, and asked plaintiffs' decedent if he was going, and added: "If you are, jump on."

There were but two witnesses sworn on the part of the plaintiff in regard to the rate at which the train was moving when this direction was given by the conductor. One of them says the train was moving at that time six or eight miles an hour; the other, who was the engineer of the train, stated that it was going from four to six miles an hour. When the conductor directed the deceased to jump on, he was standing on the passenger platform three or four feet north of the steps connecting with the freight platform, and he started to jump on the front platform of the passenger car while it was thus in motion. He was caught in some shape, as the witnesses say, without being able to describe exactly how, and rolled along the station platform with his head and shoulders above it. His body was caught about the hips. The train was stopped, and he was taken out, and died within a short time.

From this evidence it is quite plain that the train was in comparatively rapid motion at the time when the deceased made his attempt to board it. I say comparatively rapid motion, meaning by that a motion that was rapid, when taking into consideration that a man was attempting to board it. There can be no doubt from this evidence that the train was moving at least six miles an hour. The engineer fixes it from four to six; and being a witness for the plaintiff, and not in the defendant's employ at the time he was sworn, it may be assumed that he did not put the speed any greater than in fact it was.

The deceased was a man in the full vigor of life, presumably of ordinary judgment, at least up to the average of mankind, and he was at a familiar station, and about to take a train to go to a neighboring village a few miles distant. It was the duty of the railroad company (having advertised so to do) to stop its trains at the station in question, and to give ample time to all persons desirous of getting on or leaving trains at that station to do so

The important question which arises is, does a man who is sui juris, and in the full possession of his faculties, with nothing to disturb his judgment, act with ordinary care in endeavoring to board a train moving at the rate of six miles an hour? It seems to me there can be but one answer to such a question. That it is a dangerous—a most hazardous—attempt must be the common judgment of all men. Persons are taught from their earliest youth the great danger attending upon an attempt to board or leave a train while it is in motion, and no person of mature years and judgment but has the knowledge that such an attempt is dangerous in the highest degree. It is substantially admitted in this case that it would have been negligence on the part of the deceased to have made the attempt, had it not been for the request or what is termed the direction of the conductor to him to get on. It may be assumed that this direction implied a notice to the deceased that the train would not stop at that station, and that unless he attempted to get on while the car was thus in motion he would be left at the station, and compelled to take another and a later train. It may be assumed that in giving this direction, and in failing to stop the train, the company was chargeable with negligence, and yet it counts for nothing as a justification or excuse for the conduct of the deceased in attempting to board a train while thus in motion.

There may undoubtedly be circumstances

under which an attempt to get on or off a moving train would not be regarded as negligence, as matter of law, and where the question of negligence, under all the circumstances of the case, should be submitted to the jury. One such case was that of Filer v. Railroad Co., 49 N. Y. 47. There the plaintiff received the injuries complained of in attempting to get off the cars while they were in motion, making very slow progress. The plaintiff, who was a woman, was directed by the brakeman on the car to get off, and there was evidence upon which the jury might have found that she was told by him that they would not stop or move more slowly to enable her to do so. The name of the station had been called, and the speed of the train had been greatly reduced, so much so that baggage had been taken from the baggage car, and removed by the porter, and one man, who was supposed to be a little lame, had gotten off safely. Allen, J., in delivering the opinion of this court, said: "She was put to her choice without any fault of hers whether to obey the advice and suggestion of the defendant's servant, and follow the example of the man who had preceded her, or to remain on the cars, and be carried beyond the place of her destination, and away from her friends; and it was a proper question for the jury whether this was or was not, under the circumstances, an act of ordinary care and prudence." The learned judge, continuing, said: "Had the cars been going at a rapid rate, the plaintiff must have known that she would be injured in leaping from them; and the attempt to leave the cars under such circumstances, even at the instance of a railway servant, would have been a wanton and reckless act, and no recovery could be had against the defendant."

In Morrison v. Railway Co., 56 N. Y. 302, it was held that the question whether a person has been guilty of contributory negligence in attempting to alight from a car while it is in motion is not in every case a question of fact for a jury; that, when the facts are undisputed, the question of contributory negligence may become one of law. In that case the plaintiff, suing by guardian, was about 12 years of age, and the train when it approached the station slowed up. It had passed the platform, and while still in motion the plaintiff's father took her under his arm, and stepped from the car, and fell, and she was injured. Folger, J., delivering the opinion of the court said: "Can it be said that a person of ordinary prudence and care would have swung himself from a car in motion down to the ground in the dark, laden with the weight of a child 12 years old, having but one hand and one arm to aid himself with, when there was no other danger to be avoided by meeting this, and no incentive to the act other than the inconvenience of being carried by his place of abode, and with a full apprehension of the danger he was about to run? I think not, and I am of the opinion that it is so clear that the law and the court should have given the answer without calling in the aid of a jury." See, also, Phillips v. Railroad Co., 49 N. Y. 177; Soloman v. Railroad Co., 103 N. Y. 437, 9 N. E. 430.

In the last cited case Andrews, J, says: "Negligence, no doubt, is usually a question of fact of which the jury must inquire; but the inference of negligence in a given case may be so clear and convincing that the judge may direct a verdict. The conclusion that it is prima facie dangerous to alight from a moving train is founded on our general knowledge and common experience, and it is akin to the conclusion now generally accepted that it is in law a dangerous, and therefore a negligent, act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train, but this is an inconvenience merely, which does not justify exposing himself to hazard. * * * If men will take hazards, they must bear the consequences of their own rashness, and it is no just reason for visiting the consequences upon another that his negligence cooperated in producing the result."

We think that the facts in this case are so overwhelming in their nature that no reasonable judgment can be formed as to the act of the deceased in attempting to jump upon this moving train other than that it was dangerous and reckless, and that the injury resulting therefrom was contributed to by him. We do not regard it as of the slightest importance, under the circumstances of this case, that the conductor of the train notified the deceased to jump on That notification certainly cannot be interpreted to mean more than that the train would not stop or go slower than it was then going, and that if the deceased wanted to take it he must jump on at that moment. That does not alter the highly dangerous nature of the act itself. The deceased was in absolute safety at the time the direction was given. It created no emergency which called for the exercise of immediate judgment in the choice between the two dangers. It was a simple question of possible inconvenience of taking a later train, or reaching his destination by some other conveyance, and it afforded not the slightest justification or excuse for attempting to board a train moving at that rate of speed, and when he did it he did it at his own risk. We think the plaintiff, upon this state of facts, should have been nonsuited.

For these reasons the judgments of the

courts below should be reversed, and a new trial granted, costs to abide the event.

All concur, except DANFORTH, J., who reads for affirmance.

DANFORTH, J. (dissenting.) It is not suggested by the appellant that there was any misdirection by the trial judge, nor but that the defendants were guilty of negligence in not stopping their train. The appeal rests upon the single proposition that the attempt of the plaintiffs' intestate to get upon the moving train was an act of negligence contributing to his injury, and therefore sufficient as matter of law to defeat a recovery. On the contrary, it seems to me that it was merely one act among others in the case, and to be considered with all the attendant circumstances. It may derive its explanation from the conduct of the defendants, and it was therefore for the jury to say how far the decedent was influenced by them upon the occasion of the accident. Bucher v. Railroad, 98 N. Y. 128; Filer v. Same, 49 N. Y. 47; Glushing v. Sharp, 96 N. Y. 676. And if they found that the conditions which led him into danger were of the defendants' own creation, both common sense and justice forbid that they should be allowed to withhold compensation. If, on the other hand, the danger, notwithstanding the solicitation of the conductor, was so manifest that in the exercise of ordinary prudence the intestate should have observed it, or if observing it he went recklessly to the car, he should suffer the consequences of an injury brought on by himself. Many circumstances are to be taken into account in answering these questions, and if inferences are to be drawn, not all one way, then no tribunal save a jury is authorized to pass upon them.

The appellant relies upon the single fact that the train was in motion. That, as appears from the cases referred to, is not enough to exonerate the defendants. Those decisions show that an intending passenger may attempt to board a moving train, and if injured in doing so may still recover; that is, the act is not negligent of itself. The speed of the train is in all cases to be considered, but this in connection with the conduct of the train servants, and the age and activity of the traveler, before his action upon the occasion in question can be characterized. Eppendorf v. Railroad, 69 N. Y. 195; Filer v. Same, supra; Burrows v. Erie Co., 63 N. Y. 556; Hickey v. Railroad, 14 Allen, 429.

It is of the greatest importance, therefore, to ascertain the speed of the train. What was it? No exact testimony was given. But the train left Cooperstown at the usual time. The run to Phœnix was two and one-half or three miles only, and at Cooperstown the engineer shut off steam, and the train ran north to Phœnix, a distance of only two and one-half or three miles, without steam. It was a regular passenger station, where all trains were advertised to stop. The conductor intended to stop at that station, and was trying to do so. At about 80 rods distant the whistle was blown for the station, and the brakes applied continually until the train in fact came to a standstill, a short distance beyond the platform, 20 or 30 feet, or, as one witness says, 50 feet, and would have stopped sooner, or at the station, except that there was only one brakeman, and his brakes were defective. All that time the conductor stood upon the platform. In that position, and while eight or ten rods distant, he leaned out by the side of the car looking forward, and saw Hunter upon the station platform, facing the incoming train, and evidently waiting for it. When within eight or ten feet the conductor said to him: "Are you going? If you are, jump on." He reached out his hand and foot, tried to get on the car, and in some way was caught and killed. These are circumstances about which there is no doubt,—the engine moving without steam; the conductor intending to stop at the station; the whistle blown for the station as notice of that intention; the brakes applied; the train actually slowing up; and the conductor, expecting a passenger, calling him to get on. The effort was made to do so, and, it failing, the train was actually stopped within a few feet from the place where the accident occurred. Do not these circumstances all tend to show, and permit the inference, that the train was moving very slowly? There was the intention to stop; the conductor's expectation to take his passenger; and the actual stoppage of the train when the accident occurred. But the opinions of witnesses are referred to as showing the contrary. In view of the circumstances I have exhibited, those opinions may be taken with many grains of allowance. One witness says: "I should think the train was going about six or eight miles an hour." He was a by-stander. His attention was not called to the speed of the train at the time in question; but he was the plaintiff's witness, and his evidence is in the case for what it is worth. What is it worth? About six or about eight,—at once a difference of two miles. The engineer says: "At the time the train passed the station, I should say it was going from four to six miles an hour." Wicks, the fireman, testifies: "I would say from four to six miles an hour, slacking all the while." The phrase used by all the witnesses in expressing an opinion is in the highest degree indefinite, and their testimony must be weighed in view of the circumstances to which I have alluded. The rate of speed was to be determined as a fact. No witness spoke from accurate information, but gave his opinion merely, the conductor not testifying to it. Observers are competent witnesses, but few are able to say with even tolerable accuracy the rate of speed at which a train at any

given moment is moving. In this case their attention was not directed to it, and the weight of their testimony was to be determined. The court cannot say from it that the train was as a fact moving at a given rate. A jury might say the speed was less than four miles an hour,—as much less as the circumstances alluded to might indicate to them, and not necessarily faster than one might walk. The deceased was a young man, so far as appears, with the active habits of that age. He stood upon the platform of the station, mentally prepared to take the train, with every reason to expect that it would stop as usual. It cannot be said as matter of law that a man of ordinary prudence would not have yielded to the direction of the conductor, nor can it be said that to him, in view of the circumstances, the train was moving at a palpably dangerous rate. He did not attempt to board the train by reason of his own impatience, but upon the invitation of the defendants' servant. It is to be considered whether this direction of the conductor was not only a practical expression of his belief that the step might be taken in safety, but also as a strong expression of his opinion that the movement of the train was slow and within the bounds of safety. All these things might properly lead a jury to the reasonable belief that to the decedent the train did appear to be moving slowly, and, moreover, that it was in fact brought to such a point as only prevented complete inertness or stoppage,—a resource of engineers to avoid the necessity of overcoming the vis inertia of a heavy train at rest. At any rate, the defendant ought not to be permitted to assert that the intestate did not exercise what now it seems would have been better judgment in the condition in which he was placed by their acts. That he did not act prudently should not be adjudged as matter of law, nor to what extent his action was governed by what he might reasonably infer from that of the conductor.

The questions were for the jury, and were properly submitted to them. I think the judgment which followed their verdict should be affirmed.

Taking a limited train by mistake. Notice of company's rules. Ejecting passenger from train at a dangerous place. Remote cause of injury. Trespasser upon train. Punitive damages.

LAKE SHORE & MICHIGAN SOUTHERN RY. CO. v. ROSENZWEIG.

(113 Pa. St. 519, 6 Atl. 545.)

Supreme Court of Pennsylvania. Oct. 4, 1886.

Error to common pleas, Erie county.

Case by Louis Rosenzweig against the Lake Shore & Michigan Southern Railway Company. The facts are fully stated in the opinion of the supreme court. Verdict and judgment for plaintiff, for $48,750, whereupon defendant took this writ.

Rasselas Brown, John P. Vincent, C. D. Roys, and S. M. Brainard, for plaintiff in error. J. Ross Thompson, Geo. A. Allen, and S. A. Davenport, for defendant in error.

TRUNKEY, J. On the twenty-fifth of November, 1883, the plaintiff purchased a ticket at defendant's station, in Erie, good only for 30 days, for one continuous passage each way from Erie to Cleveland and return. The next morning, between 1 and 2 o'clock, when he was about to take the limited express train to return to Erie, an employé of the defendant directed him to the day-coach. He stepped in, sat down, and quickly curled up and went to sleep. After the train had started, he was awakened by the conductor's call for tickets, and instantly took from his pocket the ticket and a roll of money. The conductor reached for the ticket, immediately said, "My orders are to put you off," grabbed the bell-cord, pushed the ticket back, and said, "Your ticket is no good." Then the plaintiff vainly endeavored to show the conductor that he was mistaken, offered money in payment of the fare, which was refused, and begged not to be put off at that place, but to be carried to the next station. The conductor answered: "My orders are to put you off, and off you must get. I obey orders if I break owners. Come." Thereupon the plaintiff followed the conductor out of the car, and on reaching the ground the conductor pointed to a light, and said, "That will take you to the depot." The plaintiff started towards that light; soon saw it was on a locomotive which ran by him. He then tried to get off the tracks; came against what he supposed was a freight train, which he believed was just in motion; turned to pass round the train, and in doing so passed another train back of it; then believed it was safer to go northward, and as he started he noticed a light to his left, a train of cars backing, and a single car moving; about same time another engine passed him; and when he had crossed some tracks he was struck in the rear, and fell unconscious.

The condition on the face of the ticket, that it was good only for 30 days, was the only one of which the plaintiff had knowledge. He believed it was good on every train, had used that kind of tickets on the defendant's road for five or six years, never knew there was any discrimination in its use between trains, and had traveled on the limited express from Cleveland to Erie on such a ticket in March or April preceding the date of the injury. When he purchased this ticket, and attempted to use it, he did not know there was any difference, as to right to use it, between the limited express and other trains. Neither ticket agent nor anybody else informed him that it was not good on the limited express.

Among the facts in this case the foregoing are testified to by the plaintiff; and however much, in some particulars, his testimony may conflict with opposing testimony, and however strange it may appear that the plaintiff knew nothing of the regulations respecting the limited express trains, his credibility and the truth of his statements were for determination by the jury. All facts which the jury were warranted in finding must be kept in view in considering the alleged errors in the rulings of the learned judge of the common pleas. If believed, the testimony of the plaintiff shows that he entered the day-coach of the limited express in good faith, by direction and apparent assent of the defendant's employés, without notice or actual knowledge that his ticket was not good on that train until so informed by the conductor, and that he was put off the train, in the midst of railway tracks on which were moving and standing cars and locomotives, as soon as the conductor could stop after seeing the ticket.

The plaintiff's ticket was evidence of the payment of his fare, and of his right to be carried according to its terms. It did not express the whole contract. What it does set forth may be ascertained from the reasonable rules and regulations of the defendant; and the holder of the ticket is bound to inform himself of such regulations respecting the conduct of trains and the rights of passengers. Dietrich v. Railroad Co., 71 Pa. St. 432. The jury were instructed that the rules adopted by the defendant limiting the passengers on the limited express to such as purchased special tickets were reasonable; that it was the plaintiff's duty to ascertain whether his ticket entitled him to a passage on that train before going upon it; and, if he went on without a proper ticket, the company had the right to eject him at a safe place, using no more force than necessary. This was substantially repeated in response to the defendant's first, second, and seventh points, with addition that it was not incumbent on the defendant to bring home to the plaintiff a knowledge of its rules and regulations. But the court refused to charge that the law presumes that the plaintiff did know the regulations, and therefore the conductor, if he saw fit, had the right to eject the plaintiff at an improper and unsafe place. Wheth-

er there is a legal presumption of such knowledge is the chief question raised by the assignment of error.

At the outset the defendant supports the proposition that the law presumes that the plaintiff knew of the regulations by a most specious and ingenious argument. It is clear that an irrebuttable presumption is meant. The result of affirmance of the proposition is indicated in the brief thus: "The law made it the duty of the plaintiff to ascertain, before taking a seat in the car, whether his ticket entitled him to ride on that particular train. * * * But whether, as a matter of fact, he knew this, cuts no figure in this case. In legal contemplation he did know it. The law made it his duty to know it; and, being a duty which the law imposed, there is a conclusive legal presumption that he did know it."

The only case cited in suport of such doctrine is Horan v. Ellis, 41 Pa. St. 470, where the rule was recognized that a breach of the laws of the state is not to be presumed against any one, and the presumption is the contrary until proof overcomes it. That case gives no sanction to the proposition claimed. And the proposition is at variance with the decision in Railroad Co. v. Greenwood, 79 Pa. St. 373. There a rule was adopted and published that after February 1, 1873, passengers would not be carried on freight trains, except way-freight, and not on way-freight trains unless they had tickets. Mrs. Greenwood got on the train without a ticket; offered to pay the fare to the conductor. He refused to receive it, and put her off about a mile from a station. She had been accustomed to ride on that train, and to pay her fare to the conductor. She had no actual knowledge of the rule. Held, that the rule was reasonable; but, the plaintiff having ridden in the car before, and after the making of the rule, without a ticket and without objection, the company should not turn her out at a distance from the station without proof of express notice or actual knowledge of the rule forbidding any one to enter the car without a ticket. Under the circumstances, putting up notice at the station-house was not sufficient. The question of legal presumption of knowledge by the plaintiff of the rule was not raised and probably was not then conceived.

"Ignorance of the law, which every one is bound to know, excuseth no one." Every person in a country must be conclusively presumed to know its laws sufficiently to be able to regulate his conduct by them; for this is indispensably necessary in order to prevent greater evils. Knowledge of the laws of the state is in all cases presumed, though in no case it perfectly exists, and in multitudes of cases does not exist at all in the concrete. To a presumption of law probability is not necessary; but probability is necessary to a presumption of fact. Whart. Ev. par. 1237. But this legal presumption of knowledge has never been extended to the by-laws and regulations of private corporations. No necessity has been shown for judicial enunciation that there is a legal presumption, or a fiction of law, that a person about to become a passenger, or who has become a passenger, on a railway, knows the rules and regulations of the railway company.

A contract was made between the parties when the plaintiff purchased the ticket. Although he neglected to inform himself of all its terms, he was bound by them unless waived by the defendant. He cannot set up ignorance of them in order to establish rights not therein stipulated and implied. If he could, the defendant had no right at all to eject him from the train. Hence, in a proper sense, he was bound to ascertain and know the regulations of the defendant entering into the contract, and he had no greater rights thereunder than if he had acquired actual knowledge of its terms. As his contract gave him no right to ride on the limited express, the company could lawfully eject him. But, under the facts which the jury were warranted in finding, the defendant was bound to treat the plaintiff as a passenger who by mistake had got on a train not included in the contract. He was entitled to the rights and privileges of a passenger except as to limited express trains. He promptly exhibited his ticket, the evidence of his contract, to the conductor. As a passenger, he was rightfully at the station waiting for a train to take him to the place named in the ticket, and entered the car designated to him by an official as the coach for the passengers to Erie. There was neither gate nor closed door nor employé to warn him that his ticket was not good on that train. The plaintiff was at the station, a passenger. His entering the car was not like the case of a man entering the dwelling-house of another unbidden. One is a public conveyance; the other is private, and the occupant's home. A passenger who enters a car by mistake is not a trespasser who may be sued as such when he commits no actual injury. He has rights other than those of a trespasser. He may so conduct himself as to become a trespasser after being informed of his mistake. The defendant is a carrier, and its cars are for the accommodation of travelers. It owes a duty to every passenger who, in good faith, purchases a ticket and enters any of its conveyances. If the conveyance is not going in the direction the passenger wants to go, or is one which, by the contract, the passenger has no right to take, its duty is to inform the passenger, and put him off at a proper place.

This principle was recognized in Railroad Co. v. Schwindling, 101 Pa. St. 258. In that case the plaintiff was a child, went on the platform of the station, and was injured; but was not there as a passenger, and had no business of any kind with the defendant, or any of its agents or employés. The defend-

ant was not liable, because it owed no duty to the plaintiff. In the opinion it is remarked as conceded that when a person goes on the platform at a railway station as a passenger, or on business connected with the company, that the company owes him a duty; and, if he be injured by the negligent act of the company, he may recover damages.

There is no evidence of collusion or conspiracy between the plaintiff and any of the defendant's servants to the end that he might wrongfully ride on the limited express. As regards the plaintiff, the acts of the persons in charge of the train were the acts of the defendant. As respects his rights, it is immaterial whether the servants of the defendant violated its rules by omitting to lock the doors of the car, or to give him notice that he had no right to enter and take a seat. The doors were not locked, and the plaintiff was not notified, and it was submitted to the jury to find whether he entered with consent or acquiescence of the employés of the defendant. A passenger who has an open way to an open car going to the place to which he bought and holds a ticket, without knowledge that the ticket is not good on such a car, is not to be treated as a wrong-doer, endeavoring to ride without payment of fare, or to ride on a car which he knows his ticket gives no right to enter. If the plaintiff knew that his ticket was not good on that car, and that he had no right to enter without a special ticket, he was a trespasser; otherwise he was not; and the determination of this was fairly submitted to the jury. For the reasons stated, the third, fourth, fifth, seventh, and eighth specifications of error are not sustained.

Nor need much be added with reference to the first specification. The plaintiff's first point was not affirmed as an entirety; but, instead, the court gave full instruction on the matters suggested in the point. What the court said in the answer was the instruction, and was free of error. That instruction did not submit whether the defendant considered the place dangerous where the plaintiff was put off, but did submit whether he was ejected at a dangerous place. If it be true that the plaintiff was ejected a little west of the bridge, the conductor pointing to a light, remarking that would take him to the depot, it is by no means singular that the plaintiff did not see the bridge, or that the jury found that amid the numerous railway tracks and moving cars and locomotives, in the night-time, it was a dangerous place for a stranger. And, if he was ejected east of the bridge, there is testimony that it was amidst railway tracks, moving trains, and locomotives, and of the efforts of the plaintiff to reach a place of safety.

All the defendant's points from the ninth to the seventeenth, except the sixteenth, both inclusive, were affirmed. These need not be repeated. The jury in that way were fully instructed respecting the requisite care and duty of the plaintiff after he was ejected, and that any negligence on his part in looking out for his safety would defeat his claim for damages. They are referred to as aiding to understand the instructions of which complaint is made. For instance, the fourteenth point sharply defines the duty of the plaintiff with respect to the safe ways at the bridge, and instructed the jury that if he neglected his duty he could not recover. But in the sixteenth point the court is asked to determine the fact of neglect, and direct a verdict for defendant. The fourteenth point was pertinent with reference to the testimony. The plaintiff, since he was hurt, has learned the location of the bridge, and he thinks he was put off the car east of it. He has no recollection of passing under it, did not look for it, could have seen it had he looked for it, did not then know a bridge was there, and there was nothing to call his attention to a bridge. To have affirmed the defendant's sixteenth point would have been palpable error.

The defendant's eighteenth, nineteenth, and twentieth points were rightly refused, with proper instructions on the subject suggested. If he was knocked down by a blow in his rear, which rendered him unconscious, it does not follow that because he cannot tell what struck him, that the jury may not find the fact that his injury was the direct consequence of a particular act. It was unnecessary to find whether he was struck by a locomotive or a car, but it was essential that the jury should find that his injuries were the natural and probable consequence of the act of the conductor,—such a consequence as, under the surrounding circumstances of the case, might and should have been foreseen by the conductor as likely to flow from his act. It is said that these points were intended to squarely present the question of remote and probable cause. If the plaintiff was put off at a safe place, and he wandered to a dangerous one, the cause was remote. So would it be had he remained in the place of safety, and some agency had brought his hurt. Was the place dangerous, not alone because of the railway tracks and switches, but of their use by trains, cars, locomotives, and for the making up of trains? These were the conditions present which made the place dangerous; especially dangerous for a stranger in the night-time. While the plaintiff was trying to get out of that place, he received the injury. There is as little reason for inference that he was hurt by a sand-bag as there would have been had the blow killed him. It is probable that the jury inferred that one of the things which made the place dangerous struck him. There is where the defendant put him, and where he was hurt. The cause and effect were closely connected, and by prudent cir-

cumspection and ordinary thoughtfulness the conductor could have foreseen that the plaintiff's injury was likely to happen. Under the facts and circumstances which the jury could properly find, had the court ruled that the defendant was not liable by reason of remoteness of the cause of injury, it would have been equivalent to saying that it was wholly immaterial whether the plaintiff was ejected at a safe or a dangerous place, for in either case he could not recover.

The questions raised by the numerous alleged errors in the general charge have already been considered, and only two of the specifications, the fifteenth and twenty-second, will be noted. The fifteenth complains of the following sentence: "The plaintiff further claims that the place where he was put off was a dangerous and improper place for putting off a passenger, and that his ejection was a wrongful, wanton, and inhuman act on part of the conductor, and wholly unjustified by the circumstances."

The defendant characterizes this as unwarranted, unjust, and unfair; that there is no such averment in the declaration, nor was evidence thereof introduced at the trial, and the statement was calculated to poison the minds of the jury. It is true that the phrase "wanton and inhuman" is not in the declaration. But each count avers that, in the night-time, the plaintiff urging, asking, and insisting that he be carried at least to the nearest station and place of safety, the conductor compelled him to get off at a dangerous place: "it being upon and in the midst of many railway tracks, switches, trains, cars, engines, locomotives, and where trains of freight were and are made up, and where trains, cars, engines, and locomotives pass and repass, and at a place strange and unknown to the plaintiff." The plaintiff claimed there was testimony tending to prove that averment; and very likely, orally, at the trial, spoke of the act of ejecting him at such a place as wanton and inhuman. But whether he did so qualify the act or not, the court merely stated the claim, without alleging or asserting anything, or indicating that it was sustained by proof. With equal fairness the claims of each party were stated. If the averment in the declaration be true, was not the act of the conductor inhuman?

The twenty-second specification complains of the following: "It was the duty of the conductor to use discrimination, and not to treat, as a mere trespasser and tramp and wrong-doer, a passenger who was merely guilty, at most, of an error of judgment, or neglect to make inquiries he ought legally to have made."

That proposition is sound. If the jury found that the plaintiff was a passenger merely guilty of error of judgment, and neglect to make the inquiries he ought to have made, then he was not to be treated as a trespasser and wrong-doer. In exercising discrimination the conductor would note his conduct, whether he had or had not a ticket, or whether he was able and willing immediately to pay the fare. If he acted as a trespasser and wrong-doer, and not as a passenger who had made a mistake, he could not complain of the treatment he thus invited. With the context, it is plain that the jury could not have understood that sentence as an instruction that the plaintiff was a passenger only guilty of error of judgment and neglect. In the sentence immediately preceding, the court charged that if the plaintiff, knowing that he was not entitled to ride on that train, and in willful violation of the rules of the company entered the train, he was a mere trespasser. And the jury were repeatedly told they were to determine every question of fact.

There was no error in the refusal of defendant's fifth point. The second count alleges no contract other than is implied by accepting the plaintiff as a passenger, without his having a ticket, and charges that his tender of the fare was refused, and that he was wrongfully ejected at a dangerous place. His right to recover, under the pleadings, did not depend on showing a right to ride on the limited express. He was bound to show and did show that he was a passenger; and as such, if, by the omission of the defendant's employés to warn him that he could not rightfully enter that train without a special ticket, he entered it by mistake, he was entitled to the treatment due to a passenger, though not entitled to ride on that train. It is clear that the cause was tried on its merits; and, if it be that the declaration does not set forth the case with accuracy, it is amendable. A mere technical defect that did not and could not mislead, is no ground for reversal.

The twenty-fourth specification is not sustained for reasons stated in Lichtenwallner v. Laubach, 105 Pa. St. 366.

Were it conceded that it was error to exclude the question made the subject of the twenty-fifth specification, there is now no cause for complaint; for, at a later stage in the trial, the defendant recalled the witness, who corrected the alleged mistake, and was examined and testified fully on the very point to which the overruled question was directed.

Manifestly there is no error in the rulings made the subjects of the last two specifications.

The remaining specification which will be remarked, alleges error in the qualified affirmance of the plaintiff's second point: "That if the jury find from the evidence that the servants of the defendant ejected the plaintiff from their cars, not at a regular station, nor at a dwelling-house, as re-

quired by the rules of the company, but at a place known to the defendant to be dangerous and unsafe, then and in that case, if they find for the plaintiff, their verdict should be punitive damages."

The jury were instructed that under such circumstances they could find punitive damages or only compensatory damages. In considering other points, reference has been made to the averments and evidence touching the time, place, and circumstances of the plaintiff's ejection. It is uncontroverted that the rules referred to in the point existed, and respecting them the defendant well says: "But the rules of the company were not established for the benefit of trespassers; they were established for the protection of the public, and for the benefit of those with whom they stand in contractual relation." It is unnecessary now to consider whether the company may put off a trespasser, to whom it owes no duty, at a place where there is probability that he will be killed. Very little stress need be put on the existence of said rules, reasonable as they are, directing only such treatment as ought to be given to passengers were no such rules expressly adopted. That they are for guidance of the employés in the putting off passengers who have no right to ride on the trains which they have entered, is obvious. If they had right on the train, there would be no occasion to put them off. But, in determining whether the conductor acted in reckless disregard of the plaintiff's rights, the jury ought to have kept in view the fact that he violated an express rule calculated to promote the safety of passengers, and those having contractual relations with the defendant. This conductor committed no battery. He made no threats. He acted quickly. A glance at the ticket, a pull of the bell-rope, the stopping of the train, a deaf ear to the plaintiff's entreaties to be carried to a place of safety, a few significant words, and the plaintiff followed him to the ground, there to be pointed to a light towards the depot, but not to a bridge or any safe way out of his peril. If there was no willful misconduct by the conductor, how can it be said that he was not recklessly indifferent to the consequences likely to befall the plaintiff? If the suit were against him, there could be little question that the jury would be permitted to give exemplary damages. The liability of railway and other corporations to exemplary damages for gross negligence is well settled. The general rule in cases for negligence is that only compensatory damages can be given. Juries are not at liberty to go further than compensation, unless the injury was done willfully or was the result of that reckless indifference to the rights of others which is equivalent to a violation of them. There must be willful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences. Railway Co. v. Arms, 91 U. S. 489. The corporation is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such right to the plaintiff as against the servant were the suit against him instead of the corporation. Judgment affirmed.

Duty to passenger, as to providing safe station grounds, less than that as to providing safe cars.

MORELAND v. BOSTON & PROVIDENCE R. R. CO.

(141 Mass. 31, 6 N. E. 225.)

Supreme Court of Massachusetts. Suffolk. Jan. 12, 1886.

This was an action to recover damages for personal injuries alleged to have been received by the plaintiff in going from the defendant's train, in which she had been a passenger from Boston to Hazelwood, a station on the defendant's railroad, across the defendant's platform and grounds, appurtenant to and near the northerly end of said station, open to and used by passengers to pass to and from defendant's cars to Providence street, a highway adjoining said grounds. The facts appear in the opinion.

J. E. Cotter, for plaintiff. Russell & Putnam, for defendant.

ALLEN, J. The plaintiff, while passing from the train, on which she was a passenger on the defendant's railroad, to the highway, over the platform and station grounds, stepped upon some loose shingles which had been left on the ground by the defendant while shingling its station-house, and fell and was hurt. The plaintiff contended, and the defendant denied, that the defendant was negligent in permitting the shingles to remain there; and both parties asked instructions as to the degree of care which the defendant was bound to exercise in the matter. The plaintiff asked instructions to the effect that the defendant was bound, as a common carrier of passengers, to exercise the utmost care and diligence in providing egress from its premises; that it was liable if the plaintiff was injured through the existence of an obstruction in the premises which might have been guarded against by the utmost care and foresight on the part of the defendant; and that it was the duty of the defendant to provide for its passengers a reasonable and safe opportunity to pass from its premises, and to take means to prevent any injury to them while so passing which human care and foresight could guard against. The defendant requested instructions to the effect that the duty of the defendant was to see that the approaches to the station were reasonably safe and convenient; that its duty in that respect to its passengers did not differ from its duty to other persons than passengers having business at its stations, or from the duty of other owners of buildings towards persons having business therein. The presiding justice read these requests to the jury, and, in answer to them, gave the instruction that in case the plaintiff has the rights of a passenger, "she is entitled to all the care which human foresight can furnish her;" and, at the close of his charge, as a summary and repetition of the law and instructions upon the matters of the prayers, told the jury that if the plaintiff had been a passenger on the defendant's railroad, and was passing from the train to the highway over the platform and grounds, "the defendant was bound to be in the exercise towards her of such care and diligence as could reasonably be exercised to protect her from such injuries as human foresight could anticipate and prevent."

Taking the instructions given, in connection with the requests for instructions by the parties, the jury may well have understood that the defendant was bound to take every possible precaution against the plaintiff's injury, and was liable if human foresight could have anticipated and prevented it. The former instruction expressly referred to the degree of care; the latter, taken by itself, would refer to the object rather than the degree of care, as does so much of it as is taken from Ingalls v. Bills, 9 Metc. (Mass.) 1. But the context forbids that meaning, and, if taken by the jury as an attempt to define what degree of care was due and reasonable in the matter, it would probably confirm—in no view could it control—the former instruction. The former instruction is clearly erroneous. The latter, if its meaning is that the defendant was bound to use reasonable care to prevent injuries that could be prevented, was immaterial, as it gave no rule of reasonable care. If its meaning is that the defendant was bound to use such care as would prevent injuries which could be prevented, it was, in substance, the same as the other, and equally erroneous. If the language could be construed to intend only the rule of care required of passenger carriers in the carriage of passengers, as laid down in Ingalls v. Bills, ubi supra; Warren v. Railroad Co., 8 Allen, 227; and White v. Railroad, 136 Mass. 321,—it would not be erroneous. The degree of care is not fixed solely by the relation of carriers and passengers; it is measured by the consequence which may follow the want of care. A railroad company is held to the highest degree of care in respect to the condition and management of its engines and cars, because negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves. It would not act reasonably if it did not exercise greater care in equipping and running its trains than in regard to the condition of its station grounds. Exceptions sustained.

Luggage checked by wrong route. Responsibility for mistake rests on party checking it. Actionable negligence defined. Demurrer. Absence of contract relation. Bailment. Duty to avoid willful wrong.

BEERS et ux. v. BOSTON & ALBANY R. R. CO.

(67 Conn. —, 34 Atl. 541.)

Supreme Court of Errors of Connecticut. March 26, 1896.

Appeal from superior court, New Haven county.

Action by William A. Beers and wife against the Boston & Albany Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

This was an action brought to the superior court for New Haven county for the loss of certain trunks intrusted to the defendant as a common carrier. The complaint contained two counts. The first alleged (1) that the defendant was a common carrier between Albany and Springfield; (2) that pursuant to a contract between it and the Delaware & Hudson River Railroad Company, a common carrier between Saratoga and Albany, and the New York, New Haven & Hartford Railroad Company, a common carrier between Springfield and New Haven, the defendant had long been in the habit of receiving baggage from the Delaware & Hudson River Railroad Company at Albany, and transporting it to Springfield, and there delivering it to the New York, New Haven & Hartford Railroad Company, whenever such baggage was so checked as to indicate that it was to be so carried and delivered; (3) that the defendant received at Albany, pursuant to said contracts, two trunks of the plaintiffs, with checks, one marked, "New Haven and Saratoga—1010—via B. & A. & N. Y., N. H. & H.," and the other marked in a similar manner, but with another number, which initials meant the Boston & Albany Railroad Company, and the New York, New Haven & Hartford Railroad Company, and indicated that said checks were issued pursuant to said contracts, as in fact they were, and that said trunks were to be transported to Springfield over the defendant's railroad, and delivered to the New York, New Haven & Hartford Railroad Company, to be thence transported by it to New Haven; (4) that in consideration of the receipt of said trunks, and of said contracts, the defendant assumed control of them, and engaged, as such common carrier, to transport them to Springfield, and there deliver them to the New York, New Haven & Hartford Railroad Company; and (5) that the defendant, by its gross negligence, suffered said trunks to be destroyed, and never delivered them to the New York, New Haven & Hartford Railroad Company, or the plaintiffs. The second count, after repeating (1) the first three paragraphs of the first count, added (2) that the defendant, as such common carrier, received two trunks of the plaintiffs from the Delaware & Hudson River Railroad Company, at Albany, with the direction from it that they were to be safely transported to Springfield, and there delivered to the New York, New Haven & Hartford Railroad Company for further transportation to New Haven, said trunks being properly checked and marked for such destination, as the defendant well knew, and the defendant deposited them in one of its cars for such transportation over its railroad; (3) that the defendant made up a train, containing said car, and started it for Springfield, in order to reach which it had to pass over a certain bridge; (4) that said bridge was then, and had long been, being repaired by the defendant, and consequently was, and long had been, in a defective and unsafe condition, so that it could not sustain the weight and force of a train, and, when this train reached it, was, by the gross negligence of the defendant, in that condition, and wholly deserted by the defendant and its agents and servants, so that there was no one there to warn the conductor or engineer of its condition, or to signal the train to stop, by reason whereof it went on the bridge at full speed, and the bridge broke down, carrying the car with it, into a stream below, whereby the trunks and their contents were ruined. The answer set up that the plaintiffs bought tickets from Saratoga to New Haven over a route which was a rival to that of which the defendant's railroad formed a part, and comprised a steamboat line on the Hudson river between Albany and New York; that, without paying any consideration therefor, they caused their trunks to be checked over the route of which the defendant's railroad formed a part, to New Haven, by way of Albany and Springfield, and received checks indicating that their trunks were to be so transported; that the trunks bearing said checks were delivered to the Delaware & Hudson Canal Company at Saratoga, and were by it delivered at Albany to the defendant, to be transported to Springfield, and there delivered to the New York, New Haven & Hartford Railroad Company for transportation to New Haven, and the defendant received them, supposing from the checks that they belonged to passengers who had bought tickets over its railroad; that the only contract between it and the Delaware & Hudson Canal Company was one providing for the transportation of passengers who had bought such tickets, and that the plaintiffs had neither bought nor held any such tickets, nor did they become passengers on the defendant's road, or enter into any contract with the defendant for the transportation of said trunks; and that the trunks were destroyed without any willfulness, malice, or intentional wrong, or anything equivalent or amounting thereto, on the part of the defendant. The reply stated that, when the plaintiffs checked the trunks, they were informed by the person who had the checks in his possession that they had the right, by

virtue of their tickets, to have the trunks checked in this way, over the defendant's railroad from Albany to Springfield; and they caused them to be so checked, supposing that he had the authority to make such statement and so to check said trunks, and relying upon and believing such statement, and were guilty of no fraud or intentional wrong, but acted in good faith. The defendant filed a demurrer to the reply, which was sustained; and, the plaintiffs declining to amend their pleadings, judgment was rendered for the defendant, from which this appeal was prosecuted. No error.

Lyman E. Munson and E. P. Arvine, for appellants. George D. Watrous and Edward G. Buckland, for appellee.

BALDWIN, J. If the defendant came under any obligation to make good the plaintiffs' loss, it must have been either by virtue of some contract between them, or of actionable negligence. No such contract is alleged, unless one can be implied from the reception by the defendant at Albany of their luggage, so checked as to indicate that it was to be transported over its railroad to Springfield. It is not averred that the person from whom they obtained the checks was an agent of the defendant, or had any authority to act or speak in its behalf, nor even that he was an agent of the Delaware & Hudson Canal Company, with which the defendant was in contract relations. His statements, therefore, and the plaintiffs' reliance upon them, are of no importance, except as evincing their good faith in the transaction. On the other hand, the effect of the reply was to admit that the defendant received the luggage under the mistaken supposition that it belonged to passengers who had bought tickets over its road, and so that its transportation on its railroad had been duly paid for. Had trunks marked as destined to Springfield been received by the defendant without any particular contract or understanding in regard to their transportation, it would have assumed, simply from its position as a common carrier, an obligation to transport them safely, and have had a right to a proper compensation when the service was performed. But an express contract existed between it and the Delaware & Hudson Canal Company, under which it was bound to receive the personal luggage of passengers who held tickets entitling them to pass over both roads between Saratoga and Springfield, and the defendant was led by the checks to suppose that the trunks of the plaintiffs were luggage of that character. It did not, therefore, receive them under such circumstances as to create such an implied contract with their owners. An implied contract between two parties is only raised when the facts are such that an intent may fairly be inferred on their part to make such a contract. Such an intent may be implied, although it be certain that it never actually existed, but not unless the parties are in such relations that each ought to have had it. In the case at bar the facts not only do not justify, but absolutely exclude, such an implication. The plaintiffs did not intend to pay the defendant for the transportation of the trunks. They supposed that they had already paid for this, in purchasing tickets to New Haven by way of the Hudson river. The defendant did not intend to make any charge for their transportation. It supposed that compensation for this had been made already, under, and as an incident of, an express contract, made in its behalf by the Delaware & Hudson Canal Company, for the transportation of the owners, as passengers, over its railroad. The plaintiffs and the defendant were alike misled by appearances. It is one of those cases where a loss must be sustained by one or the other of two parties who are equally innocent of wrong, but one of whom placed it in the power of a third person to do the act which caused the injury. The plaintiffs acted in good faith in accepting the checks in question from some one in Saratoga, and causing them to be placed on their trunks; but it was this that induced the Delaware & Hudson Canal Company to deliver the luggage to the defendant at Albany, and the defendant to receive it as belonging to those whose right it was to have it transported over its line to Springfield. The plaintiffs could not in this way force the defendant into a contract relation which it certainly would never have intentionally assumed.

The defendant, having taken the plaintiffs' property into its possession for transportation over a railroad which it operated as a common carrier, was not free from all responsibility for its safe-keeping, notwithstanding it accepted its custody without any contract, express or implied. It is admitted by the pleadings that not only did the defendant run the train, in which the property was, upon a bridge which was, and long had been, so defective that it could not sustain such a burden, but also that no one was stationed there to give any warning of the danger, or signal the train to stop, and that the luggage was destroyed by reason of its gross negligence in these respects, but "without any willfulness, malice, or intentional wrong, or anything equivalent or amounting thereto." The defendant did not receive the trunks in the capacity of a common carrier of goods for hire. They were delivered to it, and accepted by it, in the capacity of a common carrier of passengers for hire. In fact, there were no passengers to be carried, to whom they belonged; but this, whether then known or unknown to the defendant, would be no excuse for any willful or intentional injury to property actually in its possession. We think, however, that it was a sufficient excuse for the negligence which is confessed. Actionable negligence is the neglect of a duty. What duty did the defendant owe to

the plaintiffs? Simply that of abstaining from anything amounting to willful or wanton injury to their property in its possession. Gardner v. New Haven & Northampton Co., 51 Conn. 143, 150. That cannot be deemed a wanton exposure of it to destruction which consisted only in running a train of cars upon an unsafe bridge, by which its own property, as well as theirs, was involved in a common loss. "Negligence signifies a want of care in the performance of an act by one having no positive intention to injure the person complaining of it." Pitkin v. Railroad Co., 64 Conn. 482, 490, 30 Atl. 772. It is true that this definition might not exclude the liability, in some instances, of a principal, on the ground of negligence, for damage consequent upon a direct act of violence or trespass on the part of servants, but this is not a case of that description. The gross negligence with which the defendant was chargeable consisted wholly of omissions. There was no willful wrong, nor yet such reckless misconduct as can be deemed its equivalent. Had the defendant voluntarily assumed the position of a "depositary" (taking this term in its strict meaning of a bailee without reward), it would not have been bound under the rules of the Roman law (which have become a part of the common law) to treat the plaintiffs' property with any more care than it gave to its own. Coggs v. Bernard, 2 Ld. Raym. 909; Dig. 16.3, "Depositi vel Contra," 32. Good faith would have been the measure of its obligations. Dig. 16, 3, 20. He who intrusts his property to a careless man, if loss ensues, must lay it to the account of his own imprudence in putting it into such hands. Inst. 3, 15, "Quibus Modis Re contrahitur Obligatio," 3. But in the case before us the elements of a bailment are wanting, for there was no contract, express or implied, between the parties. 2 Kent, Comm. *780. The defendant's obligations, not being contractual, were less than those attaching to bailees of any class. No man can have the care of another's property thrust upon him, without his invitation or consent, in such a way as to raise a duty calling for the performance of positive acts of protection. He might be bound to refrain from acts of direct injury. This is a mere negation of wrongdoing. A man acts at his peril; but he is never liable for omissions, except in consequence of some duty voluntarily undertaken. Holmes, Com. Law, 82. Had the defendant willfully thrown the plaintiffs' trunks from the bridge into the stream below, a liability would have been incurred; but this would have been an act of violence, not an absence of care. Gross negligence is not actionable where not even slight care was due. Dunlap v. Steamboat Co., 98 Mass. 371, 379. However blameworthy, it is still essentially different from intentional wrongdoing. "Magna negligentia culpa est, magna culpa dolus est." Dig. 50, 16, "De Verborum Significatione," 226. Had the checks indicated that the trunks were to be sent over the river route, their reception by the defendant for carriage over its route would have presented a very different question. Fairfax v. Railroad Co., 73 N. Y. 167, 170.

The ruling on the demurrer, with which the pleadings under the original complaint were closed, was in conformity to the views which we have expressed. It is therefore unnecessary to inquire whether, had there been error, it would not have been waived by filing a substituted complaint. There is no error in the judgment appealed from.

Cf. Dunlop v. International Steamboat Co., 98 Mass. 371; Becher v. Great Eastern Ry. Co., L. R. 5 Q. B. 241.

Free pass. Conditions exempting company from liability for accident. Pass to be signed, but not signed. Drover's pass. Gross negligence.

QUIMBY v. BOSTON & MAINE R. R. CO.

(150 Mass. 365, 23 N. E. 205.)

Supreme Judicial Court of Massachusetts. Essex. Jan. 1. 1890.

Report from superior court, Essex county; ALBERT MASON, Judge.

An action of tort by Asahel Quimby against the Boston & Maine Railroad, for personal injuries sustained in a collision upon its railroad.

H. P. Moulton, for plaintiff. S. Lincoln and W. I. Badger, for defendant.

DEVENS, J. When the plaintiff received his injury he was traveling upon a free pass given him at his own solicitation, and as a pure gratuity, upon which was expressed his agreement that, in consideration thereof, he assumed all risk of accident which might happen to him while traveling on or getting off the trains of the defendant railroad corporation on which the ticket might be honored for passage. The ticket bore on its face the words, "provided he signs the agreement on the back hereof." In fact the agreement was not signed by the plaintiff, he not having been required to do so by the conductor who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed, and was not required to sign, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. Squire v. Railroad Co., 98 Mass. 239; Hill v. Railway Co., 144 Mass. 284, 10 N. E. Rep. 836; Railroad Co. v. Chipman, 146 Mass. 107, 14 N. E. Rep. 940. The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto; but one who actually avails himself of such a ticket, and of the privileges it confers, to secure a passage, cannot be allowed to deny that he made the agreement expressed therein, because he did not and was not required to sign it. Railway Co. v. McGown, 65 Tex. 643; Railroad Co. v. Read, 37 Ill. 484; Wells v. Railway Co., 24 N. Y. 181; Perkins v. Railway Co., Id. 196. If this is held to be so, the case presents the single inquiry whether such a contract is invalid, which has not heretofore been settled in this state, and upon which there has been great contrariety of opinion in different courts. If the common carrier accepts a person as a passenger, no such contract having been made, such passenger may maintain an action for negligence in transporting him, even if he be carried gratuitously. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service. Files v. Railroad Co., 149 Mass. 204, 21 N. E. Rep. 311; Todd v. Railroad Co., 3 Allen 18; Com. v. Railroad Co., 108 Mass. 7; Littlejohn v. Railroad Co., 148 Mass. 478, 20 N. E. Rep. 103; Railroad Co. v. Derby, 14 How. 468; The New World v. King, 16 How. 469. But the question whether the carrier may, as the condition upon which he grants to the passenger a gratuitous passage, lawfully make an agreement with him by which the passenger must bear the risks of transportation, obviously differs from this.

In a large number of cases the English decisions, as well as those of New York, have held that where a drover was permitted to accompany animals upon what was called a "free pass," issued upon the condition that the user should bear all risks of transportation, he could not maintain an action for an injury received by the negligence of the carrier's servants. A similar rule would without doubt be applied where a servant, from the peculiar character of goods, as delicate machinery, was permitted to accompany them, and in other cases of that nature. That passes of this character are "free passes," properly so called, has been denied in other cases, as the carriage of the drover is a part of the contract for the carriage of the animals. The cases on this point were carefully examined and criticised by Mr. Justice BRADLEY in Railroad Co. v. Lockwood, 17 Wall. 367, and it is there held that such a pass is not gratuitous, as it is given as one of the terms upon which the cattle are carried. The decision is put upon the ground that the drover was a passenger carried for hire, and that with such passenger a contract of this nature could not be made. The court, at the conclusion of the opinion, expressly waives the discussion of the question here presented, and, as it states, purposely refrains from expressing any opinion as to what would have been the result had it considered the plaintiff a free passenger instead of one for hire. Railway Co. v. Stevens, 95 U. S. 655, in which the same distinguished judge delivered the opinion of the court, is put upon the ground that the transportation of the defendant, although not paid for by him in money, was not a matter of charity or gratuity in any sense, but was by virtue of an agreement in which the mutual interest of the parties was consulted.

Whether the English and New York authorities rightly or wrongly hold that one traveling upon a "drover's pass," as it is sometimes called, is a free passenger, they show that, in the opinion of these courts, a contract can properly be made with a free passenger that he shall bear the risks of transportation. This is denied by many courts whose opinions are entitled to weight. It will be observed that in the case at bar there is no question of any willful or malicious injury, and that the plaintiff was injured by the carelessness of the defendant's servants. The cases in which the passenger was strictly a free passenger, accepting his ticket as a pure gratuity, and upon the agreement that he would himself bear the cost of transportation, are comparatively few. They have all been carefully considered in two recent cases, to which we would call attention. These are Griswold v. Railway Co., 53 Conn. 371, (1885,)[1] and that of Railway Co. v. McGown, ubi supra, (1886,) in which the

[1] 4 Atl. 261.

precise question before us was raised, and decided, after a careful examination of the authorities, in a different manner by the highest court of Connecticut and that of Texas. No doubt existed in either case, in the opinion of the court, that the ticket of the passage was strictly a gratuity, and it was held by the former court that, under these circumstances, the carrier and the passenger might lawfully agree that the passenger should bear the risks of transportation, and that such agreement would be enforced, while the reverse was held by the court of Texas. We are brought to the decision of the question unembarrassed by any weight of authority without the commonwealth that can be considered as preponderating.

It is urged on behalf of the plaintiff that, while the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier are dependent upon the contract; that while, with reference to matters indifferent to the public, parties may contract according to their own pleasure, they cannot do so where the public has an interest; that, as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts; that the duty of the carrier requires that he should convey his passengers with safety; that he is properly held responsible in damages if he fails to do so by negligence, whether the negligence is his own or that of his servant's, in order that this safety may be secured to all who travel. It is also said that the carrier and the passenger do not stand upon an equality; that the latter cannot stand out and higgle or seek redress in courts; that he must take the alternatives the carrier presents, or practically abandon his business in the transfer of merchandise, and must yield to the terms imposed on him as a passenger; that he ought not to be induced to run the risks of transportation, for being allowed to travel at a less fare, or for any similar reason, and thus to tempt the carrier or his servants to carelessness which may affect others as well as himself; and that, in a few words, public policy forbids that contracts should be entered into with a public carrier by which he shall be exonerated from his full responsibility. Most of this reasoning can have no application to a strictly free passenger, who receives a passage out of charity or as a gratuity. Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where passes are solicited as gratuities. When such passes are granted by such of the railroad officials as are authorized to issue them, or other public carriers, it is in deference largely to the feeling of the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested. In such instances one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. The definition of a "common carrier," which is that of a person or corporation pursuing the public employment of carrying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents, for the time being, to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, also to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that besides the gift of free transportation the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence, (or that of the corporation itself, where that is the carrier,) he can contract for exemption from liability for the negligence of his servants. It may be doubted whether any such distinction in degrees of negligence, and the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied. The New World v. King, 16 How. 469. It is to be observed, however, that in the case at bar the injury occurred through the negligence of defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or furnish proper appliances of the conduct of its business. We are of opinion that where one accepts, purely as a gratuity, a free passage upon a railroad train, upon the agreement that he will assume all risk of accident which may happen to him, while traveling on such train, by which he may be injured in his person, no rule of public policy requires us to declare such contract invalid and without binding force. By the terms of the report there must therefore be judgment for defendant.

Bill of lading. Varying by parol. Connecting lines. Destination beyond route of first carrier. Discretion to choose between different routes. No recovery on common-law liability where a special contract was made.

SNOW et al. v. INDIANA, BLOOMINGTON & WESTERN RY. CO.

(109 Ind. 422, 9 N. E. 702.)

Supreme Court of Indiana. Jan. 4, 1887.

Appeal from circuit court, Clinton county.

Paul Humphries, Davidson & Dice, Wm. M. Reeves, and S. O. Bayless, for appellants. Otto Gresham and W. R. Moore, for appellee.

MITCHELL, J. The plaintiff below brought this suit against the railway company to recover damages for an alleged breach of a contract for the shipment of a car-load of horses from Crawfordsville, Indiana, to Buffalo, New York, en route to Boston, Massachusetts. At the time the horses were delivered for shipment by the appellants' agent, the latter received from the railway company a bill of lading, which contained, among other stipulations, the following:

Live-stock Contract.

The Indiana, Bloomington & Western Railway.

Cars. Initial.	No.	Consignee's marks. Destination, etc.	Crawfordsville, August 14, 1883. Received from W. H. Schooler the following stock: 17 horses.
2 D. & S.	1,275.	C. & E. Snow, Boston, Mass. Bill of Lading, (Contracting,) From Crawfordsville to Buffalo, N. Y., via..... Through at $73 per car-load.	Consigned, numbered, and marked as per margin, to be transported by the Indiana, Bloomington & Western Railway to its freight station at Indianapolis, ready to be delivered to the consignee or his order, or (if the same is to be forwarded beyond said station) to the agent of a connecting railroad or forwarding company, whose line may be considered a part of the route to the place of destination designated in the margin, to be in like manner forwarded and delivered to and by each succeeding railroad or forwarding company in the route, until it reaches the point contracted for in this bill of lading.

It was assigned as a breach of its contract that the railway company received the horses, and carried them by its own line to Indianapolis; after which, instead of delivering them to the "Bee-Line Route," as it was alleged it had agreed to do, it delivered them to the "Nickle-Plate Road," which, by reason of the latter being the longer route by about 300 miles, delayed the horses in arriving at Boston some four days beyond what would have been required by the other route. By reason of this delay, and the unfitness of the route chosen, it is alleged the horses sustained permanent injury. It is also alleged that the failure to ship by the "Bee-Line Route" was a violation of the contract of shipment.

The complaint is in two paragraphs. The bill of lading was made a part of the first paragraph. Both paragraphs count upon the violation of an alleged agreement to ship from Indianapolis to Buffalo, New York, by the "Bee-Line Route." The defendant answered by a general denial. The case was submitted for trial to a jury. Under instructions from the court, the jury returned a verdict for the defendant.

At the trial the plaintiffs produced W. H. Schooler, their agent at Crawfordsville, Indiana, and, by suitable questions addressed to him while testifying as a witness, proposed to prove that, prior to the shipment of the horses, the plaintiffs, through the witness, made a contract with the agent of the railway company by which it was agreed that the company should ship the horses by its route to Indianapolis; thence, by the "Bee-Line Route," to Buffalo, New York. The plaintiffs proposed to prove, further, that it was agreed that the horses were to be unloaded at Gallion, Ohio, a regular feeding point on the route last above mentioned, and that, after being fed and watered, they were to be again reloaded, and carried by that route to Buffalo. They proposed to prove, further, that the defendant had carried other car-loads of horses for the plaintiffs under this same arrangement, which was by parol, and that they had been carried over the "Bee-Line Route."

The bill of lading having been exhibited to the court, and it having been made to appear that the shipment in question had been made by the company after such bill of lading had been delivered to and received by the plaintiffs' agent, the court excluded all evidence relating to any parol agreement covering the subject of the shipment. Whether such evidence was admissible is the only question presented for consideration.

The appellants contend, there being no route stipulated in the bill of lading, that it became the duty of the appellee to forward the horses by the usual and most direct route from Indianapolis to Buffalo, and that hence the evidence offered should have been received. This proposition is in part abundantly maintained, but this does not meet the point in dispute. Having taken a bill of lading which, upon its face, designates no particular route by which the horses were to be forwarded after reaching the terminus of the appellee's line, was it competent, nevertheless, to prove a parol agreement to forward by a particular line? Conceding that a carrier is liable for any injury resulting to a shipper by reason of its selection of an unusual or indirect route, by which to forward freight which is destined to a point beyond its line, the question still remains, how was it material or competent to add to or vary the written contract of shipment by proof of a previous parol agreement?

A shipper who receives a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line, authorizes the initial carrier to select any usual or reasonably direct and safe route by which to forward, after the goods reach the end of his line, unless the particular line by which the goods consigned, are to be forwarded, is designated in the bill of lading. In such a case, the bill of lading being silent

in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have the right to select, at his discretion, any customary or usual route which was regarded as safe and responsible. This provision, being thus imported into the contract by law, is as unassailable by parol as are any of the other express terms of the contract. White v. Ashton, 51 N. Y. 280; Hinckley v. Railroad, 56 N. Y. 429; Simkins v. Steam-boat Co., 11 Cush. 102; Hutch. Carr. § 312; Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. 276, 288.

Stipulations which the law imports into a contract become as effectually a part of its terms as though they were expressly written therein. Long v. Straus, 107 Ind. 94, 6 N. E. 123, and 7 N. E. 763. In the absence of fraud or mistake, it must be conclusively presumed that the oral negotiations respecting the terms and conditions upon which the goods were received, and the route by which they were to be forwarded, are merged in the bill of lading. This must be taken as the final depository, and the sole evidence, of the agreement between the parties. Indianapolis, etc., Co. v. Remmy, 13 Ind. 518; Hall v. Pennsylvania Co., 90 Ind. 459; Bartlett v. Pittsburgh, etc., Co., 94 Ind. 281. The cases last cited maintain the rule that where suit is brought against a common carrier for a breach of common-law duty, in failing to carry or deliver goods, if the evidence shows that the goods were received under a special written contract which was not declared on, the variance is fatal, and there can be no recovery.

This suggestion disposes of all that is said by counsel in respect to the competency of the offered evidence, as applicable to the second paragraph of the complaint. Since it appeared that the goods were received for shipment under the written contract set up in the first paragraph of the complaint, there could, in no event, have been a recovery under the second paragraph, which simply counted upon a breach of the carrier's common-law duty. The facts offered in evidence do not bring the case under consideration within the principle which ruled the case of Guillaume v. General Transportation Co., 100 N. Y. 491, 3 N. E. 489. In that case the goods had been received and actually shipped in pursuance of a parol contract. It was held that the subsequent receipt of a bill of lading did not preclude the shipper from showing the terms of the parol contract under which the goods were received and shipped. In that case the court said: "As a general rule, where goods are delivered to a carrier for transportation, and, before the goods are shipped, a bill of lading or receipt is delivered by him to the shipper, the latter is bound to examine it and ascertain its contents, and, if he accepts it without objection, he is bound by its terms. He cannot set up ignorance of its contents, and resort cannot be had to prior parol negotiations to vary them." Germania, etc., Co. v. Memphis, etc., Co., 72 N. Y. 90.

The plaintiffs' case, as made by their complaint, proceeded upon the theory that the appellee violated its contract by shipping the property delivered to it over an unusual and indirect route, which was not provided with proper facilities for the care of stock, when another customary, direct, and more available route was open for carriage. It was competent to have recovered upon this theory, if the facts had sustained it, without proof of a parol agreement such as was offered. Such proof was neither material nor competent after it had been made to appear that, prior to the shipment, a written bill of lading had been received by them which covered the terms of shipment.

There was no error. The judgment is affirmed, with costs.

Bill of lading never delivered. Agency. Evidence of parol contract. Construction of writing by the court in the light of extrinsic facts. Error, working no injury. Suit by a holder of legal title. Parties. Insurance. Subrogation. Amount of loss, not of insurance paid, the rule of damages. Interest. Conflict of laws. Time for excepting to charge. General objection.

MOBILE & MONTGOMERY RY. CO. v. JUREY et al.

(111 U. S. 584, 4 Sup. Ct. 566.)

Supreme Court of the United States. May 5, 1884.

In error to the circuit court of the United States for the Middle district of Alabama.

The defendants in error, Jurey & Gillis, brought this action for the use of the Factors' & Traders' Insurance Company against the plaintiff in error, the Mobile & Montgomery Railway Company, to recover $12,000 for the failure of the latter to deliver certain cotton which had been placed in its possession as a common carrier. The complaint, which was drawn according to the form prescribed by the Code of Alabama, was as follows: "The plaintiffs claim of the defendant the sum of twelve thousand dollars as damages for the failure to deliver certain goods, viz., one hundred and ninety-seven bales of cotton, weighing ninety-six thousand nine hundred and thirty-six pounds, received by the defendant, as a common carrier, to be delivered to the plaintiffs at New Orleans, La., for a reward, which it failed to do." The railroad company pleaded the following pleas: "(1) The defendant, for answer to the complaint, says it is not guilty of the matters alleged therein. (2) For further answer to the complaint the defendant says that the plaintiffs, the said Jurey & Gillis, were paid the damages for the recovery of which this suit is brought, before the action was commenced." The plaintiffs demurred to the second plea. The demurrer was sustained. The cause was then tried on an issue joined on the first plea, and resulted in a verdict and judgment for the plaintiffs for $10,344.25. The defendant has by this writ of error brought the judgment under review.

David Clopton and Thos. G. Jones, for plaintiff in error. D. S. Troy, H. C. Tompkins, and Henry C. Semple, for defendants in error.

WOODS, J. All the evidence in the case is set out in the bill of exceptions taken at the trial. It tended to show the following facts: The cotton mentioned in the complaint was delivered at Montgomery, Alabama, by the defendants in error, Jurey & Gillis, to the plaintiff in error, the railroad company, to be transported to New Orleans, and there delivered to the shippers. The cotton consisted of 264 bales. The train upon which it was shipped was made up as follows: There were eight or ten box cars next to the engine; behind these were four flats loaded with the cotton, not covered by tarpaulins; and next to them, and last of the train, was a cab car in which the conductor rode. There were two men with buckets of water, besides the conductor and brakeman, to watch the cotton. While running down grade at about 20 miles an hour, and when the engine was not emitting any sparks, the signal to halt was given by the bell, and the cotton was discovered to be on fire. Every effort was made to stop the train as soon as possible, and, when this was done, the hands on the train did what they could to save the cotton; but the fire was too hot, and the burning cars and cotton were consumed. The woods, through which the train was running when the fire occurred, were on fire, and the woods were frequently burning along the defendant's road at that time of the year. It further appeared that all the cotton loaded on the platform cars, consisting of 197 bales, was consumed and, of course, never delivered to Jurey & Gillis.

The contract for the transportation of the cotton was made by Jurey with T. K. Scott, the agent of the railroad company in Montgomery. Jurey testified: "I arranged with Scott to take the two hundred and sixty bales to New Orleans for two dollars per bale. When the cotton was ready for shipment and hauling to the railroad depot I again visited Mr. Scott, at the company's office in Montgomery, in order to ascertain when my risk ceased and that of the company began, and Scott answered that soon as the cotton was delivered on the railroad platform the cotton would be at the risk of the company." Jurey further stated: "I contracted with the railroad company, through its agent, Mr. Scott, to deliver the cotton in New Orleans for two dollars per bale, with the distinct understanding that it was at the railway company's risk as soon as delivered on its platform at Montgomery. After the cotton had been destroyed by fire I saw the bill of lading for the first time, and noticed that risk by fire was excepted. I immediately went to Mr. Scott and called his attention to it, and that such was not our agreement. The bill of lading was obtained by Mr. C. Hall, the broker in the premises. I paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions." He further stated as follows: "We have been paid by the Factors' & Traders' Insurance Company, of this city, [New Orleans,] by reason of its having been covered under our open policy, and this suit is for the use and benefit of that company as subrogee of our rights, because we reinsured the cotton in that company notwithstanding that defendant had guarantied its delivery." Scott testified that, while the cotton was being delivered on the railroad platform at Montgomery, and before the signing of the bill of lading, Jurey asked him if the railroad company would be responsible in the event the

cotton was burned on the platform or in the cars, and he replied it would be in either event. Crenshaw Hall testified that he was a cotton broker in Montgomery, and acted for Jurey in deliveriug the cotton at the railroad company's depot; that he made no agreement and had no understanding with the railroad company in regard to the rate of freight. but simply sent the cotton to the depot by order of Jurey; Jurey told him that he himself would make the contract with the railroad company, as he thought he could get better rates. When the cotton was all delivered at the depot, witness received a bill of lading therefor. When the bill was delivered to him, Jurey, according to his recollection, was in the country, 10 miles from Montgomery, and did not return until news had been received of the burning of the cotton. The bill of lading was signed in the handwriting of M. H. Sayer, a freight clerk at the depot of the railroad company in Montgomery. It was as follows: "Mobile and Montgomery Railway Company. Received, from C. Hall, two hundred and sixty-four (264) bales cotton, ——— of which are in bad order, marked as stated below, and consigned to Jurey & Gillis, to be transported and delivered to same, New Orleans, at the rate of ———. And, in consideration of above rate, it is agreed upon and distinctly understood that the shipper releases the Mobile & Montgomery Railway Co. and connections from all liabilities for any loss or damage that may occur from the bursting of ropes and bagging, old damage, wet, or from fire while upon their roads." Then followed a statement of the number of bales of cotton and the marks. At the foot of the bill were the words and figures: "Frt. $2.00 bale."

The court, of its own motion, among other instructions, gave the jury the following: "That the ground taken in argument by counsel for the railroad company was not the law; to-wit, if Jurey & Gillis, before the commencement of the suit, had been paid by the Factors' & Traders' Insurance Company, as insurers, paying the loss it had insured against, and if Jurey & Gillis had no interest in the recovery, then the insurance company was the real plaintiff, and the burden of proof was on it to show the jury, by satisfactory evidence, how much it had so paid; and that if it failed to do so, or to give the jury evidence to enable them to determine satisfactorily what its loss or damage was, then nothing more than nominal damages could be recovered." The court further charged the jury, of its own motion, that if the plaintiffs were entitled to recover, the measure of the damages would be the value of the cotton at New Orleans, where it was to have been delivered, together with interest on said sum so ascertained, at the rate of 8 per cent. per annum, from the time when the cotton ought to have been delivered. The court, at the instance of the plaintiff's counsel, gave the following instruction: "That the paper read in evidence by the defendant, as a bill of lading, contains no restriction upon the liability of the defendant as a common carrier."

The defendant asked the court to give the jury the following instructions: "(2) If the jury find from the evidence that Jurey & Gillis insured said cotton in and by the Factors' & Traders' Insurance Company, for whose use this suit is brought, then, upon the loss of the cotton by fire, and payment of the insurance money by the insurance company to Jurey & Gillis, the insurance company was subrogated to the rights of Jurey & Gillis, and can maintain a suit in the name of Jurey & Gillis for their use to recover the amount paid by them to Jurey & Gillis; but upon these facts the plaintiffs cannot recover under the complaint in this case, and if the jury find such to be the facts, they must find for the defendant." "(4) If the jury find from the evidence that Jurey & Gillis were paid by the Factors' & Traders' Insurance Company (for whose use this suit is brought) before this suit was brought, for the damages sustained by Jurey & Gillis by the burning of the cotton, then the plaintiffs cannot recover in this action and under the complaint in this case." The court refused to give either of these instructions.

The first assignment of error argued by the counsel for plaintiffs in error relates to the admission in evidence of the testimony of Jurey and Scott, in respect to the terms of the contract by which the railroad company undertook to transport the cotton of the defendants in error to New Orleans. The contention is that the bill of lading was the contract, and, being in writing, no parol evidence could be received to vary its stipulations. Before this rule can be applied the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was, what was the contract between the parties? No particular form or solemnity of execution is required for a contract of a common carrier to transport goods. It may be by parol, or it may be in writing; in either case it is equally binding. Transportation Co. v. Moore, 5 Mich. 368; Shelton v. Merchants' Dispatch T. Co., 59 N. Y. 258; Roberts v. Riley, 15 La. Ann. 103. The defendants in error insisted that the contract between them and the railroad company was by parol; that it was made between Jurey for the defendants in error, and Scott for the railroad company, and denied that the bill of lading was the contract, and alleged that it had never been delivered to the defendants in error, but only to Hall, who was not authorized to make a contract for them. It is plain, upon this statement of the controversy, that evidence of the parol contract was perfectly competent, and it was a question to be decided by the jury whether the understanding, as detailed by the witnesses, or the bill of lading ex-

pressed the agreement of the parties. The evidence that the contract was by parol, and was not the contract expressed in the bill of lading, came from Jurey, one of the defendants in error, and from Scott, the agent of the plaintiff in error, between whom it was made, and was not contradicted. The contention that this evidence should have been excluded, is certainly not based on any solid ground. There is nothing in this assignment of error for which the judgment should be reversed.

The next contention of the plaintiff in error is that the court erred in instructing the jury "that the paper read in evidence by the defendant as a bill of lading contains no restriction upon the liability of the defendant as a common carrier." It is insisted that the purport of the charge is that, independent and irrespective of the parol evidence, and upon its face, the contract contains no restriction. But such is evidently not the meaning of the instruction, because the words of the bill of lading clearly import an exception to the liability of a common carrier. What the court must have meant was that, in view of the circumstances under which the bill of lading was executed, as detailed by the uncontradicted evidence of the witnesses, taken in connection with the fact that the rate of freight, which is stated to be the consideration for the exception, is left blank in the body of the bill of lading. It was not the intention of the parties to the contract that the railroad company should be exempted from any of the liabilities of a common carrier. The court was called upon to construe a paper writing. It must be conceded that the writing was open to construction. It was the right and duty of the court, in order to decide upon its meaning, to look not only to the language employed, but to the subject-matter and surrounding circumstances. Barreda v. Silsbee, 21 How. 161; Nash v. Towne, 5 Wall. 689; Canal Co. v. Hill, 15 Wall. 94. When, therefore, the court was required to state authoritatively to the jury the meaning of the bill of lading, it cannot be presumed that it shut its eyes to the strong light thrown on it by the facts attending its execution, or that its instruction is to be interpreted as applying only to the words of the contract. It must be presumed that the court used all proper means to ascertain the true meaning of the bill of lading, and we think its interpretation, in view of all the circumstances of the case, was the right one.

The next ground upon which the plaintiffs in error ask a reversal of the judgment is the refusal of the court to give the charges numbered 2 and 4 as requested by the plaintiff in error. The argument in support of this assignment is as follows: Section 2891 of the Code of Alabama provides: "In all cases where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered as the sole party in the record." In no part of the body of the complaint is there any averment showing in what way and by what means the Factors' & Traders' Insurance Company acquired an interest in this suit or a right to bring this action in the name of the owners of the cotton for their use, or that they have any interest in the suit; and as the evidence shows that the Factors' & Traders' Insurance Company acquired their right to bring a suit against a carrier by having paid their insurance liability to Jurey & Gillis, which was a secondary liability, the carrier being primarily liable, the form of complaint adopted in this case was not sufficient: that the complaint should state with certainty the facts showing the right of the insurance company to bring the action and the amount of the recovery to which they are entitled. The ground of their contention is that the recovery must be limited to the amount paid by the insurance company to the defendants in error, and that the burden is on the insurance company to prove what sum was so paid. This is an attempt to reverse the judgment of the circuit court on a question of pleading. The record in the case, in our opinion, shows that the plaintiff in error made a contract for the transportation of the cotton of the plaintiffs, with no exception of the carrier's common-law liability; that it did not deliver the cotton, for the value of which this suit is brought; that the cotton was destroyed while in the possession of the plaintiff in error, and was a total loss; and that the loss has been paid to the defendants in error by the insurance company. Under these circumstances, as it plainly appears on the face of the record that the judgment of the circuit court was right, it would not be reversed for an error which could not possibly have worked any injury to the plaintiff in error. Brobst v. Brock, 10 Wall. 519; Decatur Bank v. St. Louis Bank, 21 Wall. 294.

But we are of opinion that the ground upon which this assignment of error is based is not tenable, which is that the recovery must be limited to the amount paid by the insurance company to the defendants in error, and that the burden is on the insurance company to show how much it paid. Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned. The payment of a total loss by the insurer works an equitable assignment to him of the property, and all the remedies which the

insured had against the carrier for the recovery of its value. Mason v. Sainsbury, 3 Doug. 61; Yates v. Whyte, 4 Bing. N. C. 272; Clark v. Hundred of Blything, 2 Barn. & C. 254; Insurance Co. v. Tyler, 16 Wend. 385; Insurance Co. v. Storrow, 5 Paige, 285.

This rule is so strictly applied that when two ships belonging to the same owner came into collision with each other, and one of them sank and became a total loss, it was held that the insurers of the lost ship did not, upon their payment of a total loss, become entitled to make any claim for the loss against the insured as the owner of the ship in fault in the collision, for their right existed only through the owner of the ship insured, and not independently of him, and as he could not have sued himself they could have no remedy against him. Simpson v. Thompson, 3 App. Cas. 279. See, also, Insurance Co. v. Sherlock, 25 Ohio St. 50.

In Gales v. Hailman, 11 Pa. St. 515, it was held that a shipper who has received from the insurer the part of the loss insured against, might sue the carrier on the contract of bailment, not only in his own right for the unpaid balance due himself, but as trustee for what has been paid by the insurer in case of the carrier, and upon the trial of such a case the court will restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction.

Insurers of a ship which has been run down and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of this value will give them the whole spes recuperandi, and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy. Association v. Armstrong, L. R. 5 Q. B. 244. See, also, Clark v. Wilson, 103 Mass. 227.

The authorities above cited which relate to marine policies apply, as well as the other cases cited, to the question in hand, for in Hall v. Railroad Co., 13 Wall. 367, it was held that "there is no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land."

We are of opinion, therefore, that the recovery in this case might properly have been, as it was, for the entire loss sustained by the nominal plaintiffs, without regard to the amount of insurance paid. The only effect of the provision of section 2891, Code of Alabama, is to make the party for whose use the suit is brought dominus litis, and to give it the same rights as if it were the assignee of the cause of action. Its recovery is on the nominal plaintiff's cause of action. But as there is no formal assignment, and the suit is in the name of the nominal plaintiff, the party beneficially interested is only bound to establish the cause of action, without proof of his equitable right to the recovery.

It follows from these views that the complaint was sufficient for the case as presented by the evidence, and that the evidence tended to sustain the case stated in the complaint.

The next ground for reversal argued by the plaintiff in error is that the circuit court erred in sustaining the demurrer to the second plea. It has already been stated that, under the Code of Alabama where a suit is brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party to the record. In view of this provision of the statute, in a suit brought by one person for the use of another, a plea of payment which does not allege a payment to the beneficial plaintiff, or a payment to the person holding the legal title, before the person holding the beneficial interest acquired his right, is clearly bad. The plea which was adjudged insufficient makes neither of these averments, and was therefore bad. The object of the plea seems to have been to raise the question whether the payment by the insurer to the insured, for property lost while in the possession of a common carrier, discharged the liability of the common carrier. If the plea was based on any such theory, the views we have expressed show that it did not present a bar to the present action.

The last assignment of error which we shall notice is based on the charge of the court, to the effect that "the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at 8 per cent. per annum from the time when the cotton ought to have been delivered." The error alleged is that the rate of interest should have been placed at 5 per cent., which is the legal rate in Louisiana, where the contract was to be performed, and not at 8 per cent., which was the legal rate in Alabama, where the contract was made.

Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: First, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be 8 per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was therefore ineffectual. It should have pointed out to the court the precise part of the charge that was objected to. "The rule is that the matter of exception shall be so brought to the attention of the court, before the retirement of the jury to make up their verdict, as to enable the judge to correct any error, if there be any, in his instructions to them." Jacobson v.

State, 55 Ala. 151. "When an exception is reserved to a charge, which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the court to the precise point of objection." Railroad Co. v. Jones, 56 Ala. 507. So, in Lincoln v. Claflin, 7 Wall. 132, this court said: "It is possible the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. * * * But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. * * * It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct."

On these authorities we are of opinion that the ground of error under consideration was not well saved by the bill of exceptions. Many other grounds of error have been assigned, though not argued by counsel for the plaintiff in error. But what we have said covers most of them. The others are not well taken. We find no error in the record. The judgment of the circuit court is therefore affirmed.

Connecting lines. Through shipment of goods sold to consignee. Consignor, when liable for freight. Question of fact.

UNION FREIGHT R. R. CO. v. WINKLEY et al.

(159 Mass. 133, 34 N. E. 91.)

Supreme Judicial Court of Massachusetts.

Suffolk. May 19, 1893.

Appeal from superior court, Suffolk county. Action by the Union Freight Railroad Company against John N. Winkley and others to recover freight charges. Judgment was ordered for defendants, and plaintiff appeals. Affirmed.

It appeared from an agreed statement of facts that plaintiff, at the occurrence of the events hereinafter mentioned, and for a long time previous, was a common carrier, having its usual place of business in Boston, and operating a railroad between the stations of the various railroads, including those hereinafter mentioned, which have their terminal points in Boston; that the defendants were copartners dealing in ice under the name of Winkley & Maddox, having a usual place of business in Boston, and in the year 1890 having part of their stock stored in ice houses on the shore of Smith's pond, in the town of Wolfborough, in the state of New Hampshire; that the defendants sold to N. M. Merrick, of Plympton, in this commonwealth, in August, 1890, a car load of ice at a price per ton delivered on the cars; that there was a side track (constructed on private lands by parties interested in the ice trade) from a railway operated by the Boston & Maine Railroad, running alongside of the ice houses of the defendants, upon which track cars were pushed up by the Boston & Maine Railroad Company, and left to be loaded; that the defendants' servants loaded the said ice in a car thus left on said side track; that one of the defendants' servants informed the station agent at a station of said railroad company about two miles distant that there was at the ice houses of Winkley & Maddox, at the pond, a car of ice for N. M. Merrick, Plympton, Mass., giving the number of the car, and giving no other instruction or direction; that no other information concerning the destination of the car was at any time given the Boston & Maine Railroad Company; that said company waybilled the said car to N. M. Merrick, Plympton, Mass., via the Old Colony Railroad Company, billed the freight charges to N. M. Merrick, hauled the car to Boston, and delivered it to the Union Freight Railroad Company to be hauled to the Old Colony Railroad Company; that the Union Freight Railroad Company hauled said car from the freight yard of the Boston & Maine Railroad to that of the Old Colony Railroad Company, and delivered it to the latter company, paying to the Boston & Maine Railroad Company its freight charges, and taking its said bill to N. M. Merrick, so paid and receipted; that the Old Colony Railroad Company paid to said Union Freight Railroad Company the amount of the bill so paid to the Boston & Maine Railroad Company, and its own (the Union Freight Railroad Company's) charges to said N. M. Merrick for its freight; that the Old Colony Railroad Company billed these charges, plus its own charges for transportation from Boston to Plympton, to said N. M. Merrick, sending to said Merrick the said bills for freight, and delivered the said ice to said Merrick at Plympton. Neither said Merrick nor any one else has paid said freight charges. The defendants thereafter claimed payment for said car of ice from Merrick, but payment has not been made.

C. F. Choate, Jr., for appellant. Lund, Jewell & Welch, for appellees.

FIELD, C. J. The plaintiff is the second in a line of three connecting railroads over which the ice was transported, and the freight due to the first two roads has been paid by the last. We assume, without deciding it, that the right of the plaintiff to maintain this action is the same as if it were the first road, and the freight had not been paid. With whom, then, did the Boston & Maine Railroad make the contract for transportation, and who promised that company to pay the freight? There was no express contract. The defendants, through their servants, might have contracted with the railroad to pay the freight, although, as between themselves and Merrick, he was bound to pay it, but they made no such contract, in terms. A consignor of merchandise delivered to a railroad for transportation may be the owner, and act for himself, or may be an agent for the owner, and act for him, and this may or may not be known to the railroad company. In the present case the railroad company knew the name and residence of the consignee. From the agreed facts it appears that the title to the ice passed to Merrick when it was put on board the car, and that it was transported at his risk. The doctrine of the courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof. Lawrence v. Minturn, 17 How. 100; Blum v. The Caddo, 1 Woods, 64, Fed. Cas. No. 1,573. In Dicey on Parties to Actions, (pages 87, 88,) the result of the English decisions is stated to be as follows: "The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, i. e. the person whose goods they are, and who would suffer if the goods were lost. * * * When, therefore, goods are sent to a person who has purchased them, or are shipped under a bill of lading by a person's order, and on his account, the consignee, as being the person at whose risk the goods are, is considered the person with whom the contract is made. He is liable to

pay for the carriage, and is the proper person to sue the carrier for a breach of contract." And, (Id. page 90, note:) "When the consignor acts as agent of the consignee, but contracts in his own name, it would appear that either the consignor or consignee may sue." Dawes v. Peck, 8 Term R. 330; Domett v. Beckford, 5 Barn. & Adol. 522; Coombs v. Railway Co., 3 Hurl. & N. 1; Sargent v. Morris, 3 Barn. & Ald. 277; Dunlop v. Lambert, 6 Clark & F. 600; Railway Co. v. Bagge, 15 Q. B. Div. 625; Cork Distilleries Co. v. Great Southern & W. Ry. Co., L. R. 7 H. L. 269. The cases generally are collected in Hutch. Carr. § 448 et seq.; Id., § 720 et seq. Most of the English cases were reviewed in Blanchard v. Page, 8 Gray, 281. That was a case of the carriage of goods by sea under a bill of lading, and it was held that the bill of lading was a contract between the shipper and the shipowner, and that although it was shown that the shipper acted as agent of the consignees, who had bought and paid for the goods before shipment, yet he could bring an action in his own name for breach of the contract of carriage, unless he was prohibited by his principal, and it was said that he would be liable for the freight. In Wooster v. Tarr, 8 Allen, 270, it was decided that under a bill of lading in the usual form the shipper was liable to the carrier for the freight, although the bill contained the usual clause that the goods were to be delivered to the consignees or their assignees, "he or they paying freight for said goods," etc. It was said "to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed." Both these cases were upon express contracts.

The strongest case for the plaintiff is Finn v. Railroad Co., 102 Mass. 283, which was upon an implied contract. In that case one Clark had ordered shingles of Finn, who shipped them on his own account, under a bill of lading, on board a canal boat, to be delivered to "the Great Western Railroad Company, or their assignees, at Greenbush, N. Y. Consignee to pay freight on the delivery." And the shingles arrived by boat at the freight station of the railroad company at Greenbush, N. Y. The shingles were described in the bill of lading as marked, "J. S. C. Extra," or "J. S. C." They were burned, while in the freight house, by an accidental fire. They were intended to be transported to Joseph S. Clark, Southamptou, Mass. Clark accepted and paid a draft drawn by Finn for the shingles; and, in a suit by Finn against him, Clark pleaded the amount of the draft in set-off, and recovered the amount, on the ground that "the omission of the plaintiff [Finn] to forward the goods with proper directions to the consignee and the place of delivery authorized the defendant [Clark] to treat the alleged sale as one never perfected, and to recover back the money paid upon the draft." Finn v. Clark, 10 Allen, 479, 12 Allen, 522. Finn then brought suit against the railroad company for its failure to forward and deliver the shingles to Clark. It was held that although the case of Finn against Clark settled the fact that, as between them, the title to the property remained in Finn, yet the railroad company, not being a party to that suit, could not set up the judgment in it "as an estoppel against Finn upon the question of" delivery. Finn v. Railroad, 102 Mass. 283. At the second trial the plaintiff obtained a verdict, and the facts stated in the exceptions showed "that the title to the property had passed to Clark before the loss occurred, leaving Finn, at most, only right of stoppage in transitu;" and it was in this aspect of the case that the opinion in 112 Mass. 524, was delivered. The contention of the plaintiff was that the shingles had been delivered to the railroad company with proper directions for their transportation, and that the defendant had neglected to transport them, whereby they had been burned. In the opinion the court say of the liability of a common carrier that, "prima facie, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. * * * When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon the contract may, if they must not necessarily, be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit goods, or if sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser." Although this was not a suit to recover freight, the principles on which it was decided are applicable to such a suit, and the effect of this and the previous decisions, we think, is that in this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or dis-

proved by evidence; and if the vendee has ordered the goods to be sent at his risk, and on his account, he also may be held liable as the real principal in the contract. See Byington v. Simpson, 134 Mass. 169. But, whether the presumption be one way or the other, it is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is the understanding of the parties. See Railroad v. Whitcher, 1 Allen, 497. In the present case there was no bill of lading or receipt signed by the railroad company, and accepted by the defendants. There was a waybill but it does not appear that the names of the defendants were in it. The freight charges were made in every instance to Merrick, the consignee, and the bills for freight were sent to him. These facts, and perhaps some others stated in the agreed facts, afford some evidence that the railroad company understood that Merrick was to pay the freight to the company. Upon an agreed statement of facts this court cannot draw inferences of fact, unless they are necessary inferences. Railroad v. Wilder, 137 Mass. 536. The agreed facts in this case, we think, contain some evidence that the understanding of all the parties was that Merrick should pay the freight to the railroad company; and we cannot hold, as matter of law, that the defendants made a contract on their own behalf to pay the freight. Judgment affirmed.

Connecting lines. Through bill of lading. Delivery to connecting carrier. Special agreements. Contracts of Inter-State carriage not to be construed by State law.

MYRICK v. MICHIGAN CENTRAL R. R. CO.

(107 U. S. 102, 1 Sup. Ct. 425.)

Supreme Court of the United States. Jan. 8, 1883.

In error to the circuit court of the United States for the Northern district of Illinois.

This is an action for breach of two alleged contracts of the Michigan Central Railroad Company with the plaintiff, Paris Myrick, each to carry for him 202 head of cattle from Chicago to Philadelphia, and there deliver them to his order. It arises out of these facts:

Myrick was in 1877 engaged, at Chicago, in the business of buying cattle, sometimes on his own account and sometimes for others, and forwarding them by railway to Philadelphia. The company is a corporation created by the state of Michigan, and its line extends from Chicago to Detroit, where it connects with the Great Western Railroad, which, by its connections, leads to Philadelphia. In November, 1877, Myrick purchased two lots of cattle, each consisting of 202 head, and shipped them over the road of the company. One of the purchases and shipments was made on the seventh and the other on the fourteenth of the month. It will suffice to give the particulars of the first of these transactions, as they were identical in all respects, except in the amount of the draft negotiated and the weight of the cattle. On the shipment of the cattle Myrick took from the company a receipt, as follows:

"Michigan Central Railroad Company,

"Chicago Station, November 7, 1877.

"Received from Paris Myrick, in apparent good order, consigned order Paris Myrick, (notify J. and W. Blaker, Philadelphia, Pa.:)

Articles.	Weight or Measure.
Two hundred and two (202) cattle.....	240,000

"Advance charges, $12. Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at ——.

"Wm. Geagan, Agent."

On the margin of the receipt was the following:

"This company will not hold itself responsible for the accuracy of these weights as between buyer and seller, the approximate weight having been ascertained by track-scales, which is sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller. This receipt can be exchanged for a through bill of lading.

"Notice.—See rules of transportation on the back hereof. Use separate receipts for each consignment."

On the back of the receipt the rules were printed, one of which, the eleventh, was as follows:

"Goods or property consigned to any place off the company's line of road, or to any point or place beyond the termini, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting, for the purpose of delivery to such carrier, as the agent of the consignor or consignee, and not as carrier. The company will not be liable or responsible for any loss, damage, or injury to the property after the same shall have been sent from any warehouse or station of the company."

On the day this receipt was obtained, Myrick drew and delivered to the Commercial National Bank, at Chicago, a draft, of which the following is a copy:

"$12,287.57. Chicago, November 7, 1877.

"Pay to the order of Geo. L. Otis, cashier, twelve thousand two hundred and eighty-seven 57-100 dollars, value received, and charge the same to account of

"Paris Myrick.

"To J. and W. Blaker, Newtown, Pa."

As security for its payment Myrick indorsed the receipt obtained from the railroad company and delivered it, with the draft, to the bank, which thereupon gave him the money for it. The cattle were carried on the road of the Michigan Central to Detroit, and thence over the road of the Great Western Railroad Company to Buffalo, and thence over the roads of other companies to Philadelphia, the last of which was the road of the North Pennsylvania Railroad Company. They arrived in Philadelphia in about four days after their shipment, where, according to the uniform custom in the course of business of the railroad company, they were turned over to the drove-yard company, which was formed for the purpose of receiving cattle arriving there, taking care of them, and delivering them to their owners or cousignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties without the production of the carrier's receipt transferred by Myrick to the Commercial National Bank. The Blakers paid the expense of the transportation, took possession of the cattle, sold them, and appropriated the proceeds. The lot shipped on the fourteenth of November were delivered in like manner to the Blakers by the drove-yard company without the production of the carrier's receipt, given to the bank, and were in like manner disposed of. Soon afterwards the Blakers failed, and the two drafts on them, one made upon the shipment of November 7th and the other on the shipment of November 14th, were not paid. Hence the present action for the value of the cattle thus lost to the bank, Myrick suing for its use.

It appeared on the trial that Myrick had made previous shipments of cattle from Chicago to Philadelphia, and taken similar re-

ceipts from the Michigan Central Railroad Company; that the cattle shipped had always been delivered by the Pennsylvania Company, at Philadelphia, to the drove-yard company there, and by that company delivered to the Blakers without the production of the carrier's receipt or any bill of lading; that the Blakers were dealers in cattle, and had particular pens in the yards assigned to them; that the cattle of the shipments of November 7th and November 14th were, on their arrival, placed by the superintendent of the drove-yards in those pens and were sold by the Blakers on the following day, and that the carrier's receipt was not called for either by the railroad or the stock-yard company. It also appeared on the trial that Myrick bought the cattle for the Blakers, and that a person employed by them accompanied the cattle from Chicago until their delivery at the drove-yard at Philadelphia; that the through rate from Chicago to Philadelphia on the cattle was 58 cents per hundred; that notice of this rate was posted in the station of the defendant company at Chicago, and that it was not the custom of the railroad company at Philadelphia to look to the consignee for freight, but collected it from the drove-yard company. The court was requested to give to the jury various instructions, one of which, though presented under many forms, amounts substantially to this: That as the road of the Michigan Central Railroad Company terminates at Detroit, the company was not bound, in the absence of special contract, to transport the cattle beyond such termination, and that the receipt of freight for a point beyond and an agreement for a through fare did not of themselves establish such a contract. The court refused to give this instruction, or any embodying the principle which it expresses. On the contrary, it instructed the jury that the receipt, termed "bill of lading," under the circumstances in which it was made, was a through contract, whereby the defendant agreed to transport the cattle named in it from Chicago to Philadelphia, and there deliver them to the order of Paris Myrick, and to notify the Blakers of their arrival; that this was the undertaking on the part of the defendant company with the plaintiff Myrick, and with any assignee or holder of the contract. The facts attending the transaction not being disputed, there could be only one result from this instruction—a recovery by the plaintiff. From the judgment entered thereon the case is brought to this court for review.

Geo. F. Edmunds and A. L. Osborn, for plaintiff in error. W. C. Larned and John N. Jewett, for defendant in error.

FIELD, J. The principal question presented by the instruction requested by the defendant has been elaborately considered and adjudged by this court. It is only necessary, therefore, to state the conclusion reached.

A railroad company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the states. As was said in Railroad Co. v. Manufacturing Co.: "It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." 16 Wall. 324. This doctrine was approved in the subsequent case of Pratt v. Railroad Co., 22 Wall. 123, although the contract there was to carry through the whole route. Such a contract may of course be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See, also, Insurance Co. v. Railroad Co., 104 U. S. 157.

The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried.

In the present case the court below held

that by its receipt, construed in the light of the circumstances under which it was given, the Michigan Central Railroad Company assumed the responsibility of transporting the cattle over the whole route from Chicago to Philadelphia. It did not submit the receipt with evidence of the attendant circumstances to the jury to determine whether such a through contract was made. It ruled that the receipt itself constituted such a contract. In this respect it erred. The receipt does not, on its face, import any bargain to carry the freight through. It does not say that the freight is to be transported to Philadelphia, or that it was received for transportation there. It only says that it is consigned to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And, after the description of the property, it adds: "Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at ——," leaving the place blank. This blank may have been intended for the insertion of some place on the road of the company, or at its termination. It cannot be assumed by the court, in the absence of evidence on the point, that it was intended for the place of the final destination of the cattle. On the margin of the receipt is the following: "Notice.—See rules of transportation on the back hereof." And among the rules is one declaring that goods consigned to any place off the company's line, or beyond it, would be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting for that purpose as the agent of the consignor or consignee, and not as carrier; and that the company would not be responsible for any loss, damage, or injury to the property after the same shall have been sent from its warehouse or station. Though this rule, brought to the knowledge of this shipper, might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company.

The doctrine invoked by the plaintiff's counsel against the limitation by contract of the common-law responsibility of carriers, has no application. There is, as already stated, no common-law responsibility devolving upon any carrier to transport goods over other than its own lines, and the laws of Illinois restricting the right to limit such responsibility do not, therefore, touch the case. Nor was the common-law liability of the defendant corporation enlarged by the fact that a notice of the charges for through transportation was posted in the defendant's station-house at Chicago. Such notices are usually found in stations on lines which connect with other lines, and they furnish important information to shippers, who naturally desire to know what the charges are for through freight, as well as for those over a single line. It would be unfortunate if this information could not be given by a public notice in the station of a company without subjecting that company, if freight is taken by it, to responsibility for the manner in which it is carried on intermediate and connecting lines to the end of the route. Nor was the liability of the company affected by the fact that the notice on the margin of the receipt stated that the ticket given might be "exchanged for a through bill of lading." It would seem to indicate that the receipt was not deemed of itself to constitute a through contract. The through bill of lading may also have contained a limitation as to the extent of the route over which the company would undertake to carry the cattle. Besides, if weight is to be given to this notice as characterizing the contract made, it must be taken with the rule to which it also calls attention, that the company assumed responsibility only for transportation over its own line. It follows from the views expressed that the court below erred in its charge that the ticket or bill of lading was a through contract, whereby the defendant company agreed to transfer the cattle to Philadelphia, and safely deliver them there to the order of Myrick.

Our attention has been called to some decisions of the supreme court of Illinois which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is prima facie bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. Railroad Co. v. Frankenberg, 54 Ill. 88; Railroad Co. v. Johnson, 34 Ill. 389. Assuming that such is the purport of the decisions they are not binding upon us. What constitutes a contract of carriage is not a question of local law upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment. Chicago City v. Robbins, 2 Black, 429; Railroad Co. v. Nat. Bank, 102 U. S. 14; and Hough v. Railway Co., 100 U. S. 213.

If the doctrine of the supreme court of Illinois, as to what constitutes a contract of carriage over connecting lines of roads, is sound, it ought to govern, not only in Illinois, but in other states; and yet the tribunals of other states, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in Massachusetts. Nutting v. Railroad Co., 1 Gray, 502; Burroughs v. Railroad Co., 100 Mass. 26. If we are to follow on this subject the ruling of the state courts, we should be obliged to give a different interpretation to the same act—the reception of goods marked for a place be-

yond the road of the company—in different states, holding it to imply one thing in Illinois, and another in Massachusetts.

The judgment must be reversed, and the case remanded for a new trial; and it is so ordered.

See, in affirmance, Pennsylvania R. R. Co. v. Jones (1894) 155 U. S. 333, 15 Sup. Ct. 136.

Connecting lines. Freight prepaid through. Lien of last carrier. Forwarding agent. Perishable freight, billed for quick delivery. Unreasonable delay.

CROSSAN v. NEW YORK & NEW ENGLAND R. R. CO.

(149 Mass. 196, 21 N. E. 367.)

Supreme Judicial Court of Massachusetts. Suffolk. May 10, 1889.

Report from superior court, Suffolk county; JOHN W. HAMMOND, Judge.

Trover by Barney Crossan against the New York & New England Railroad Company. A verdict was directed for defendant, and the case is reported to this court for determination.

S. J. Thomas and *C. P. Sampson*, for plaintiff. *W. C. Loring* and *R. M. Saltonstall*, for defendant.

HOLMES, J. This is an action of trover for the conversion of 19 horses. The horses were shipped by the plaintiff on the Pennsylvania Railroad, at Philadelphia, for Boston; were delivered by that company to another, at Jersey City; and were carried the last part of the way over the defendant's line. The plaintiff prepaid the freight demanded, which was $44. But the Pennsylvania Railroad, in making up the total, allowed only $32 for carriage east of Jersey City, instead of $50, as it should have done by the defendant's tariff; so that there were $18 still to be paid, if the defendant was to receive its usual rate. At the time the defendant accepted the goods for carriage it had notice of the contents of the way-bill, from which perhaps a jury might have inferred that a railroad agent, versed in its abbreviations, would have understood that there had been an attempt to prepay the freight. It had not seen the written contract between the plaintiff and the Pennsylvania Railroad. This contract was shown to the defendant before the refusal of the latter to deliver. It contained the words, "Freight, 44.00, prepaid;" and also a promise by the plaintiff to pay the Pennsylvania Railroad at the rate of 22 cents per hundred pounds, which would make the total $44. On the other hand, it showed that the horses were to be carried to Boston, and did not purport to bind the Pennsylvania Railroad as a carrier for the whole distance, but contemplated delivery to other carriers, not specified. We are to take it also that the Pennsylvania Railroad was not the agent of the defendant, as the plaintiff's counsel disclaimed that ground. When the horses arrived at Boston the defendant refused to deliver them, except upon payment of the amount unpaid, which is the alleged conversion.

The question is whether the defendant had a lien for the freight due to it, according to its schedule, and unpaid. The answer is not to be found in the letter of the document, but in general principles of law and considerations of policy. The plaintiff contends that the Pennsylvania Railroad was a special agent, having no ostensible authority greater than that which he actually intended to give it; or, at least, that, if the defendant had notice that he had prepaid the freight demanded, it had notice that the Pennsylvania Railroad had no authority to give it a lien for any further sum which the defendant might be entitled to demand. This view is not without sanction. Marsh v. Railway Co., 3 McCrary, 236.[1] But we think that there are weightier considerations in favor of the defendant. Suppose that it had had the facts definitely before it. It would have seen, to be sure, that the plaintiff did not contemplate paying any more money, but it would have seen also that he did contemplate and desire that the horses should be carried through to Boston by a continuous and speedy passage. The existence of the latter expectation is confirmed by the plaintiff's declaration and by his testimony. He was not entitled to have both his expectations made good by the defendant. An unforeseen case had arisen, and the defendant was called on by the plaintiff's forwarding agent to act at once in some way. Potts v. Railroad Co., 131 Mass. 455. The forwarding agent, whatever its obligations to the plaintiff, only consented to be liable personally to the defendant for $32, but required the defendant to forward the goods. The defendant was not bound to carry for less than its full charge, if it had any right to do so. But if the demand to forward was authorized ostensibly or by implication,—that is to say, if the carriage would give it a lien,—it was liable to the plaintiff if it refused, except that it might demand prepayment. The plaintiff was not present, and it might take time and cost money to communicate with him. The horses were perishable, and their keep would probably have cost more than the unpaid freight, if they had been delayed, although we do not now decide whether these last facts make a difference in the law. If the plaintiff had a contract with the Pennsylvania Railroad, that company could be made to indemnify the plaintiff in the place where the contract was made. Under such circumstances, there can be no doubt what course was most for the advantage of the owner, or what directions a prudent owner, if present, would give, and the analogies of the law would imply a corresponding authority in the defendant. Knight v. Railroad Co., 13 R. I. 572, 576; Pierce v. Insurance Co., 14 Allen, 320, 323. If the effect of the plaintiff's instructions were doubtful, the law would give the defendant the benefit of the interpretation adopted by it in good faith, (Ireland v. Livingston, L. R. 5 H. L. 395, 416,) and would consider the necessity of an immediate decision, (Hawks v. Locke, 139 Mass. 205, 209, 1 N. E. Rep. 543.) But the defendant does not need the aid of such considerations. Taking into account what we have said, and also that the defendant had a right to assume that the plaintiff knew that it was not bound by the Pennsylvania Railroad's contract, and therefore knew that a higher rate

[1] 9 Fed. 873.

might be demanded beyond the lines of that road than had been paid, we are of opinion that the defendant was justified in giving preponderance to the requirement of continuous and speedy carriage, and in assuming that the authority of the Pennsylvania Railroad to offer the horses was not conditional upon the prepayment of freight by the plaintiff turning out to be full payment of all that the defendant could demand. See Wolf v. Hough, 22 Kan. 659; Wells v. Thomas, 27 Mo. 17; Vaughan v. Railroad Co., 13 R. I. 578, 581; Schneider v. Evans, 25 Wis. 241, 250, 261, *et seq.*

It is to be observed that the principle that no man's property can be taken from him without his consent, express or implied, has not prevented the last of a line of carriers from maintaining its lien, when the first carrier has forwarded the goods to a wrong place. Briggs v. Railroad Co., 6 Allen, 246, (distinguishing Robinson v. Baker, 5 Cush. 137;) Whitney v. Beckford, 105 Mass. 267; Patten v. Railway Co., 29 Fed. Rep. 590, (disapproving Fitch v. Newberry, 1 Doug. Mich. 1;) Vaughan v. Railroad Co., 13 R. I. 578. Yet in that case the last carrier might be said to have notice that the forwarding agent's authority was limited to sending the goods to the place directed by the shipper.

A subordinate argument was suggested, that the plaintiff was entitled to go to the jury on the allegations of unreasonable delay in transportation, and of detention of the horses upon the defendant's cars. But there was no evidence of unreasonable delay by the defendant after the horses were received, and the consequences of the detention after arrival are only alleged as matter of aggravation of the alleged wrongful refusal to deliver them. As the refusal was rightful, negligence in the care of the horses while detained, if any there was, cannot be relied on as a substantive cause of action. It is plain, too, that the case was not tried on the footing of an action for negligence in rightful keeping, and the plaintiff acquiesced in that view of the case, and did not seek to amend. The questions of evidence are not argued by the plaintiff, and are sufficiently answered by the foregoing discussion. Judgment on the verdict.

Through freight line of associated companies. Partnership. Through contract.

BLOCK v. FITCHBURG R. R. CO.

(139 Mass. 308, 1 N. E. 348.)

Supreme Judicial Court of Massachusetts. May, 1885.

Linus M. Child, for plaintiff. Sohier & Welch, for defendant.

MORTON, C. J. The evidence at the trial tended to show that the several defendant corporations formed an association or company, under the name of "The Erie and North Shore Despatch," for the transportation of merchandise between Boston and Chicago; that the association had an agent in Boston who was authorized to receive goods at Boston for transportation over the line to Chicago, and to give bills of lading or contracts for transportation like the one upon which the plaintiff sues; that the plaintiff delivered goods to such agent, and received the bill of lading in suit; and that a part of the goods were lost between Boston and Chicago. By the bill of lading, "The Erie and North Shore Despatch" contracts to carry the goods from Boston by the Fitchburg Railroad, and thence by the Erie & North Shore Despatch to Chicago, and then to deliver them to connecting railroad lines to be forwarded to Denver, their destination. The several railroad companies which form the association are not named in the contract. It is a single and indivisible contract, by which the Erie & North Shore Despatch Line agrees to carry the goods to Chicago, the freight to be earned upon the delivery there to the connecting line. So far as the question in this case is concerned, it is unlike those cases where a railroad forming one link in a line of connecting roads between two points receives goods to be transported over its line and delivered to the connecting road, in which it has been held in this commonwealth that each railroad in the continuous line is liable only for loss or damage happening on its own road. Darling v. Railroad Co., 11 Allen, 295; Gass v. Railroad Co., 99 Mass. 220; Burroughs v. Railroad Co., 100 Mass. 26; Aigen v. Railroad, 132 Mass. 423.

The defendants formed a company, and in its name made a special contract to carry the plaintiff's goods from Boston to Chicago. They are, so far as the plaintiff is concerned, partners, and liable jointly and severally for any loss or damage to his goods between Boston and Chicago, unless they are exempted from liability by the terms of the contract. Hill Manuf'g Co v. Boston & L. R. Co., 104 Mass. 122. The principal difficulty in this case is as to the true construction of the contract of carriage It contains the provision that in case of loss or damage to the property received, "whereby any legal liability or responsibility shall or may be incurred, that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening thereof." It also contains a provision that, in case of loss or damage of any of the goods "for which either of said companies may be liable, it is agreed that said company shall have the benefit of any insurance effected thereon by the owner." The defendants contend that the expression "that company," in the clause above cited, means that railroad company in any part of the continuous line between Boston and Denver, so that, although the plaintiff's loss occurred between Boston and Chicago, that railroad company in whose custody the goods were when lost is alone liable. This is not the necessary, and we do not think it the fair, construction of the defendant's contract. By it the Erie & North Shore Despatch, as a company, undertake to carry the goods to Chicago, and there to deliver them to a connecting line. The several railroads which constitute this company are not named or referred to in the contract. It is in the same terms as if the Erie & North Shore Despatch had been a single railroad corporation, with a road from Boston to Chicago. In other parts of the contract the expressions "this company" and "said company" are used in connections which clearly show that they refer to the defendant company, and not to any railroad company between Boston and Chicago. Thus, there is the provision that it is "agreed that the Erie & North Shore Despatch will not be liable for loss or damage or delays to the above goods on any river or lake;" and "said company will not be liable for any loss" by guerillas or military seizures. So there is the provision that, "in consideration that this company has reduced the price of such transportation below the local rates, the shipper and owner does hereby release the Erie & North Shore Despatch, and the steamboat and railroad company which may receive said property, from liability for breakage," etc. In these clauses the word "company" clearly refers only to the defendant company, and the connecting company or companies between Chicago and Denver.

The words "said company" or "said companies," used in the clause as to insurance, and other places, by their natural interpretation refer to companies which have previously been named We cannot see why the words "that company." in the clause we are considering, should receive a different construction from that given to equivalent or similar words in other parts of the contract. The plaintiff was dealing with the defendant company alone for the transportation as far as Chicago. He did not know the parties who composed that company, and entered into no separate contract with either of them. He had the right to interpret the words "that company" as meaning the defendant company, and not a railway company nowhere named in his contract. The effect of this interpretation is, what seems to have been in the minds of the parties, to release the defendant company from liability after it had

carried the goods to the end of its route, according to its contract, and had delivered them to the connecting carrier, and to hold it liable to the point to which it had assumed and contracted to transport the goods as a common carrier.

We are of opinion that this is the fair construction of the contract, and therefore that the learned justice who presided at the trial in the superior court erred in directing a verdict for the defendants. Exceptions sustained.

Delivery to connecting carrier. Contract to carry through to destination. Acceptance of bill of lading by agent. Special limitation of liability. Delay by negligence. Notice of claim for damage.

JENNINGS et al. v. GRAND TRUNK RY. CO. OF CANADA.

(127 N. Y. 438, 28 N. E. 394.)

Court of Appeals of New York, Second Division. Oct. 6, 1891.

Appeal by defendant from judgment entered upon order of the general term of the supreme court in the fifth judicial department affirming judgment entered on report of referee in favor of the plaintiffs. Affirmed.

For shipment and transportation to East St. Louis, Ill., J. H. Shanley & Co. caused to be delivered to the defendant, and the latter received, potatoes at the times, places, and in the quantities following: April 18, 1881, at Prescott, Canada, 401 bushels; April 18, 1881, at Edwardsburgh, Canada, 812 bushels; April 18, 1881 at Brockville, Canada, 400 bushels; April 20, 1881, at Brockville, Canada, 400 bushels; April 26, 1881, at Kingston, Canada, 402 bushels. The potatoes belonged to J. H. Shanley & Co., who were named as consignees of all the potatoes except those delivered to the defendant at Prescott. They were consigned to the order of the Merchants' Bank of Canada, with directions to advise Shanley & Co., and all the potatoes reached the place of destination except those shipped at Prescott. They did not arrive there. The purpose of this action was to recover damages alleged to have been sustained by the negligence of the defendant in its failure to transport those last mentioned to the place of destination, and for their loss in consequence, and in delaying the delivery at East St. Louis of those which did reach there, by reason whereof the potatoes were injured, and the market price had fallen when they did arrive at that place. The claim of Shanley & Co. against the defendant was assigned to the plaintiffs. The referee found the facts in support of it, and directed judgment against the defendant. The defendant's railway is within the dominion of Canada, of which it is a corporation. Its most westerly station is Point Edward, but its practical western terminus is at Ft. Gratiot, in the state of Michigan, where connection is made with other railroads extending west. The plaintiffs gave evidence to the effect, and the referee found, that on February 8, 1881, Shanley & Co. wrote a letter to the defendant's agent at Toronto, requiring the lowest rates for shipment of potatoes in car-load lots from Prescott and other stations in that vicinity on its railway to East St. Louis, Ill., and certain other places, and on the 12th of that month received answer by letter from the defendant's assistant general freight agent, saying: "I will give you the following rates on potatoes in full car-loads from Prescott, and stations in the vicinity, to * * * East St. Louis, 28 cents. Be good enough to let me know if these rates are accepted before shipping, so that I may advise our agents." That the rates so given were for each 100 pounds. That on or before April 18, 1881, Shanley & Co. duly accepted such rates, and notified such assistant general freight agent of such acceptance, who, on or prior to that day, so advised defendant's local freight agents at Prescott and stations in that vicinity; and that no notice was given to Shanley & Co. by the defendant, or any of its agents, that the defendant would not assume the duties and liabilities imposed by law upon common carriers in the shipment of potatoes and their transportation between the points and for the rates mentioned. The alleged defense is that the defendant was not chargeable with the consequences of delay or negligence in the transportation of the potatoes beyond its own railway line; and that there were certain limitations in the contract of affreightment which relieved it from liability, and certain conditions precedent which the plaintiffs' assignors failed to observe. And to support its defense the defendant put in evidence shipping bills termed therein "shipping notes," similar in form, one of which was as follows:

"Grand Trunk Railway Company of Canada. This company will not be responsible for any goods missent, unless they are consigned to a station on their railway. Rates, weights, and quantities entered on receipts are not binding on the company, and will not be acknowledged. All goods going to or coming from the United States will be subject to customs charges, etc. Prescott, Date, April 18th, 1881. The Grand Trunk Railway Company of Canada will please receive the undermentioned property, in apparent good order, addressed to J. H. Shanley & Co. East St. Louis, Ill., to be sent by the said company, subject to the terms and conditions stated above and on the other side, and which are agreed to by this shipping note delivered to said company as the basis upon which their receipt is to be given for said property.

No. of Packages and Species of Goods.	Marks.	Weight, lbs.
Paid on.		24,000
1 car Potatoes, said to contain 400 bushels, in bulk, O. Risk.	C. T.	
Car 8,679.		
Via Chi. & Alton R. R.		
19 42		
80 58		
100 00		

"J. E. DU BRULE, Consignor."

Among the terms and conditions on the other side of this paper were the following: "General notices and conditions on carriage: (1) It is agreed and understood that the Grand Trunk Railway Co. of Canada will not be responsible for goods of any kind conveyed upon this railway unless receipted for by a duly-authorized agent of the company." "(3) Nor will the company be liable for damages occasioned by delays caused by storms, accidents, overpressure of freight or unavoidable causes, or by the weather, wet, fire, heat, frost, or delay of perishable articles, or from civil commotion." "(5) And in all cases where herein not otherwise provided the delivery of goods shall be considered

complete, and the responsibility of the company shall terminate, when the goods are placed in the company's sheds or warehouse, (if there be conveniences for receiving the same,) at their final destination, or when the goods shall have arrived at the place to be reached on said company's railway. (6) Lumber, coals, bricks, and all other goods carried by the car-load shall be taken as delivered, and the company's responsibility in respect thereof shall cease, upon the car in which they are carried being detached from the train at the station on the company's line to which it is consigned, or at the station where in the usual course of business it leaves the company's line." "(10) That all goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no direction to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse, (if there be such convenience for receiving same,) pending communication with consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, misdelivery, damage, or detention that may happen to goods so sent by them, if such loss, misdelivery, damage, or detention occur after the said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to, or beyond their said limits. (11) That all property contracted for at a through rate, or otherwise, to or from places beyond the line of the Grand Trunk Railway, if shipped by water, shall, while not on the company's railway, or in their sheds or warehouses, be entirely at their owner's risk. In case of loss or damage to any goods for which this company or connecting lines may be liable, it is agreed that the company or line so liable shall have the benefit of any insurance effected by or for account of the owner of said goods, and the company so liable shall be subrogated in such rights before any demand shall be made on them. (12) That no claim for damage to, loss of, or detention of, any goods for which this company is accountable, shall be allowed unless notice in writing, and particulars of the claim for said loss, damage, or detention are given to station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods in respect to which said claim is made are delivered. (13) Storage will be charged on all freight remaining in the company's sheds or warehouses over twenty-four hours after its arrival." "(15) That the company shall not in any case, or under any circumstances, be liable for loss of market, nor will they be liable for claims arising from delay or detention of any train in the course of its journey, or at any of the stations on the way, or in starting; and the company do not undertake to load or send goods upon or by any particular train, if there be an insufficient number of cars at any station, or the cars cannot be conveniently used for the purpose, or if from any cause cars loaded at a station are unable to be sent on by trains passing or starting from such station." These shipping bills were signed by or in the name of the person who delivered the potatoes to the defendant for Shanley & Co., and the defendant's station agents gave receipts to such persons. None of the receipts were produced in evidence, nor were their contents proved. Further facts appear in the opinion.

E. C. Sprague, for appellant. *Martin W. Cooke*, for respondents.

BRADLEY, J., (after stating the facts.) The place to which the potatoes were consigned was beyond the line of the defendant's railway; and, unless it had contracted to transport them further than the western terminus of its road, the duty of the defendant required it only to diligently convey the potatoes to that point, and there deliver them to the connecting carrier. Rawson v. Holland, 59 N. Y. 611. But the conclusion of the referee was that the defendant undertook to deliver the potatoes at East St. Louis. If that proposition is supported, the defendant was responsible for the consequences of any default or want of reasonable diligence in that respect on any part of the route, unless relieved by some limitation of liability in the contract of affreightment. Root v. Railroad Co., 45 N. Y. 524; Condict v. Railway Co., 54 N. Y. 500, 4 Lans. 106. The communications had between Shanley & Co., the plaintiffs' assignors, and the defendant's freight agent on the subject had relation to through rates for transportation of the potatoes for Shanley & Co. from the places where they were afterwards delivered to and received by the defendant to East St. Louis. The rates for such purpose were given and accepted. The defendant's station agents at the places of shipment were, by the direction of the freight agent, advised of the rates; and the potatoes were delivered, and in car-load lots shipped, consigned to such place of destination. They belonged to Shanley & Co., of which the station agents were also informed at the time of the delivery for shipment. The defendant's railway then had the means of connection at Ft. Gratiot and Detroit with trunk lines of railroad running westerly to Chicago and St. Louis. Although the question whether what had occurred between Shanley & Co. and the defendant's agent constituted an agreement for through transportation was not free from doubt, the finding was justified that it was such that the unqualified delivery and acceptance of the potatoes may have been treated as in pursuance of a contract to transport them to the place of destination. And,

in view of the facts and circumstances furnished by the evidence, the conclusion of the referee was warranted that in such event there was an undertaking of the defendant to transport the potatoes to that place unless the contract so represented was modified by some further arrangement. Quimby v. Vanderbilt, 17 N. Y. 306; Railway Co. v. Merriman, 52 Ill. 123.

Upon that subject our attention is called to the shipping bills executed by the persons who performed the act of delivering the property, and to the receipts or bills of lading given to them by the defendant's station agents. As a general rule, the bill of lading given by a carrier to and accepted by the shipper of goods contains the contract for carriage, and, in the absence of fraud, imposition, or mistake, the parties are concluded by its terms as there expressed. Long v. Railroad Co., 50 N. Y. 76; Kirkland v. Dinsmore, 62 N. Y. 171; Hill v. Railroad Co., 73 N. Y. 351. In this instance the receipts or bills of lading of all the potatoes which reached the place of destination were there delivered up to the agent of the railroad company from whose custody the property was taken by the consignees. They were not produced at the trial, nor were their contents proved. The shipping bills or notes purport to have been requests of the persons subscribing them that the defendant receive the property addressed to the consignees, "to be sent by the said company subject to the terms and conditions stated above and on the other side, and which are agreed to by this shipping note delivered to the company as the basis upon which their receipt is to be given for said property." Shanley & Co. had no knowledge of the making of the shipping bills, nor did they authorize the execution of them, unless it came within the power incident to the direction given to deliver the property for shipment. It seems that Shanley & Co. purchased the potatoes, and directed their delivery at the defendant's stations by the persons who delivered or caused them to be taken there for such purpose.

Ordinarily, a person authorized to deliver and delivering the property of another to a common carrier for shipment may by the latter be treated as having authority to stipulate for and accept the terms of affreightment, and, as against the carrier, the owner is bound by them. Nelson v. Railroad Co., 48 N. Y. 498; Shelton v. Dispatch T. Co., 59 N. Y. 258. The limitation of the common-law responsibility of the defendant depended upon a special contract to that effect; and the burden of proving such contract was with the defendant. To do this the shipping bills taken and retained by it were produced. On the back of each of these were 21 numbered provisions in fine print. Of these bills it may be assumed that Shanley & Co. had no personal knowledge until they were produced at the trial. They were upon printed blanks kept for the purpose by the defendant, and the referee found that they were made "in conformity with the general requirement or custom of the defendant on the receipt of goods for transportation;" and that Shanley & Co. "then knew it to be the universal custom of railroad companies, so far as their experience went, to require shipping bills to be executed by the shipper, containing the terms and conditions of shipment, upon the delivery of potatoes or similar goods to such companies for transportation." It appears by those bills that the giving of receipts by the defendant's agent was then contemplated. And the referee found that the defendant's receipts or bills of lading, containing some terms and conditions for the transportation of the potatoes, were so given, but that no evidence was offered to prove what those terms and conditions were. The contents of those papers constituted in part, at least, the contract, and for the complete proof of it they would seem to have been essential. It evidently was for that reason that defendant's counsel requested the referee to find, which he did, that the contracts executed and delivered by the defendant at the time of the shipment of the potatoes had not been proved, and thereupon insisted that without proving them the plaintiffs were not entitled to recover. There is no legal presumption to the prejudice of the plaintiffs arising out of the fact that receipts or bills of lading were given, so far as relates to the contract. Those papers had, however, been delivered up at the place and time of the receipt of the property, and it may be assumed that they were accessible to the defendant.

The question arises as to the effect of the terms and conditions of the shipping bills upon the rights of the plaintiffs, and to what extent they operate to relieve the defendant from its common-law duty; and this may depend somewhat upon the authority which the defendant had the right to treat as possessed by the persons signing those bills at the time they were made. Inasmuch as no conditions were mentioned in connection with the information given by the freight agent of the through rates for which the defendant would transport the property, it may be that Shanley & Co. supposed that the common-law duty would be assumed by the defendant as such carrier; and that would have been the situation if no special terms had been provided for when the property was delivered to the defendant. And, although Shanley & Co. had not undertaken to furnish the property for shipment, they had the right to assume, unless advised to the contrary, that when delivered for that purpose it was received pursuant to the arrangement before then made, so far as related to the rates and through transportation; and, consistently only with such previous understanding or agreement, the defendant was permitted to treat it as within the authority of the persons who delivered the potatoes to make or accept stipulations or conditions for the reception and carriage of the property by it, and beyond that the owners were not necessarily bound by anything contained in the shipping bills, so far as it was dependent merely upon the presumption of authority of the persons executing them. Treating, as we do upon the facts found, the defendant's contract as one for transportation of the property

to the place of destination, the provisions and conditions upon the shipping bills, so far as they may be otherwise construed, are not applicable to the shipments in question. Riley v. Railroad Co., 34 Hun, 97; Babcock v. Railway Co., 49 N. Y. 491; Condict v. Railway Co., 54 N. Y. 500. The conclusion was permitted that not only did Shanley & Co. have no knowledge of the shipping bills, but that the receipts or bills of lading did not come to them until the potatoes were shipped and had gone forward. They were therefore not necessarily charged with any of the terms and conditions (whatever they were) of the bills of lading other than such as the defendant was at liberty to treat as within the authority of the persons receiving them to accept in behalf of the owners of the property. Coffin v. Railroad Co., 64 Barb. 379, 56 N. Y. 632; Bostwick v. Railroad Co., 45 N. Y. 712; Germania Fire Ins. Co. v. Memphis & C. R. Co., 72 N. Y. 90; Guillaume v. Transportation Co., 100 N. Y. 491, 3 N. E. Rep. 489; Swift v. Steam-Ship Co., 106 N. Y. 206, 12 N. E. Rep. 583; Park v. Presston, 108 N. Y 434, 15 N. E. Rep. 705. And to that extent, and that only, the terms and conditions of the shipping bills, so far as reasonable and applicable to through transportation of the property by the defendant, must for that purpose be deemed within the contract. But limitation of the common-law liability of the carrier is dependent upon language in the contract fairly requiring such construction without the aid of implication. The provisions to the effect that the defendant would not be responsible for delay in the transit of the property did not have the effect to relieve it from the consequences of delay occasioned by its negligence, as exemption from liability for that cause was not expressed in the contract. Magnin v. Dinsmore, 56 N. Y. 168; Mynard v. Railroad Co., 71 N. Y. 180; Nicholas v. Railroad Co., 89 N. Y. 370. There was evidence upon the subject, and by it was supported the finding of the referee, that the loss suffered and the damages sustained by the plaintiffs' assignors were caused by the defendant's negligence in transporting the potatoes.

Among the terms and conditions on the back of the shipping bills was one numbered 12, which provided "that no claim for damages to, loss of, or detention of any goods for which this company is accountable, shall be allowed unless notice in writing and particulars of the claim for said loss, damage, or detention are given to station freight agent at or nearest to the place of delivery within 36 hours after the goods in respect to which said claim is made are delivered." No such notice was given. The referee refused to give effect to it upon the request of the defendant's counsel, and exception was taken. The view of the referee was that this provision was not applicable to shipments beyond the terminus of the defendant's railway. The place of delivery was East St. Louis. And the same reason for the requirement of the notice when the place of delivery by the defendant is beyond its own line of road exists for it as when such place is upon its railway. The purpose of the notice evidently was to enable the carrier to investigate the nature, cause, and extent of the injury or damages claimed, with a view to the means of the protection which such opportunity may afford. It is the accountability of the defendant for damages that renders the notice essential, and by the terms of the clause in question no other condition is required. It is true that other clauses are to the effect that the defendant should not be responsible beyond its own railway for goods passing over it, and from it onto other roads, but it is contemplated that its cars containing goods might go forward on connecting railroads to the place of destination. It is not seen how that fact can qualify or limit the purpose of the notice. The delivery in view is to the consignee. This can be done only at the place to which the goods are consigned. Before delivery there, he may not be supposed to have either the opportunity or means of giving the notice.

It is legitimate for a common carrier, by contract with the shipper, to provide for a reasonable time within which notice of claim for loss or damage shall be given as a condition of liability, and the manner of giving it. Express Co. v. Caldwell, 21 Wall. 264; Express Co. v. Hunnicutt, 54 Miss. 566; Lewis v. Railway Co., 5 Hurl. & N. 867. In those cases the notices provided for were held to be reasonable. And that question is an open one for consideration. Westcott v. Fargo, 61 N. Y. 542, 551; Express Co. v. Reagan, 29 Ind. 21. In this present case each car contained 400 bushels and upwards of potatoes. The time in which the condition required notice to be given might not include more than 12 business hours to ascertain the requisite particulars of the claim for the purpose of the notice. It is easy to see that the specified time of 36 hours would be inadequate to the necessity that might exist in a case like the one under consideration. The conclusion was permitted that, in view of the character and extent of the property, and the nature of the claim for damages which might and did arise, the time specified within which to give notice, with particulars, was quite unreasonable; and therefore, and for that reason, the condition in that respect was inapplicable to the shipments in question, and the failure to give such notice was no bar to the remedy. This view renders it unnecessary, in the consideration of the effect of such condition, to refer further to the circumstances under which the shipping bills were made, in view of the fact that it does not appear that the condition was in the bill of lading. No other question seems to require the expression of consideration. The judgment should be affirmed. All concur, POLLETT, C. J., in result.

Delay in delivery. Vis major. Strike of employees. Acts of violence. Employees abandoning service cease to be servants.

GEISMER v. LAKE SHORE & MICHIGAN SOUTHERN R. R. CO.

(102 N. Y. 563, 7 N. E. 828.)

Court of Appeals of New York. June 22, 1886.

Appeal from the judgment of the general term, Fifth department, in favor of plaintiff, and from an order denying a motion for a new trial.

Upon the trial of this action there was evidence proving, or tending to prove, these facts: On the twenty-first day of July, 1877, the plaintiff delivered to the defendant, at Toledo, in the state of Ohio, a large number of cattle and hogs, to be transported, within a reasonable time, over its railroad, to Buffalo, in this state, there to be delivered to him. The usual and ordinary time for the transportation of such freight between the two places named was about 25 hours. The plaintiff's cattle and hogs were started on a train of defendant's cars for their destination, and were carried with reasonable dispatch, and without delay, so far as Collinwood, in the state of Ohio, where they arrived on the twenty-second day of July. Collinwood was a place where it was usual and customary for the defendant to stop all its stock trains for the purpose of changing engines, engineers, firemen, and crews, employed on such trains; and the train on which plaintiff's stock was shipped, stopped there for the purpose of making such usual changes.

When plaintiff's stock arrived there, the defendant was willing and desirous to proceed and continue the carrying of the stock to Buffalo, and had all the necessary cars, locomotives, and employés to make up and manage the train; but it was prevented from proceeding immediately, and accomplishing in the usual time the carriage of the stock to its destination, in consequence of a portion of its employés striking, and refusing to run the train, or to permit others so to do. A few weeks prior to the arrival of the plaintiff's stock at Collinwood, the defendant made an order reducing the pay of its employés engaged on its trains, and at their stations and shops, 10 per cent., and by reason of such reduction many of the employés refused to work on the defendant's trains, or to permit others to work who were willing to; and many of the firemen and brakemen who had been in the defendant's employ took forcible possession of some of the defendant's engines, and some of the fixtures of the engines, and detached engine hose, let the water out of the engine boilers, uncoupled cars, carried away and hid some coupling pins and links, placed the engines in the round-house, and barricaded the same. The persons who took such forcible possession of the property of the defendant were a great number,—over 200 persons,—the greater portion of whom were firemen and brakemen who had been in the employ of the defendant up to the time of the strike on the twenty-second day of July, and were the controlling element of the force which prevented the moving of defendant's trains at Collinwood. Such persons boldly and defiantly refused to obey any of the orders of the defendant's officers, and refused to permit any of the defendant's trains to be moved, and threatened persons who should attempt to move any of the trains or cars until the demands of the strikers should first be complied with. The officers of the defendant made various attempts to move trains from Collinwood, and placed on the trains employés who were willing to work and operate the same; but they were prevented from moving the trains by threats, and were compelled to desist from all attempts to move them from Collinwood.

During all the time from the day the stock arrived at Collinwood until it was finally reshipped, the officers of the defendant exerted themselves with great diligence to move the trains, and to induce and persuade those who up to that time had been in the employ of the defendant to return to their places on the trains, and to permit the defendant to have the use and control of its property, the railroad, and its fixtures; but they openly declared and announced that they would do so only upon the condition that the order of the defendant reducing the wages of the employés should be annulled, and the wages restored as they were before the reduction. They also demanded the annulling of the rule requiring certain qualifications of engineers, and the removal of the general master mechanic, and that no one should be discharged for having taken part in the riot. And the strikers would have disbanded, and the late employés of the defendant would have promptly resumed their employment with the defendant, and would have ceased all force and violence to the defendant, its officers and employés, and would have allowed and restored to the defendant the full and complete control of all its property and its railroad, had their demands been acceded to; but the defendant refused to accede to the demands. There was a sufficient number of other competent workmen willing and ready to take the places of the strikers at such reduced wages, who could at any time have been so employed, and who would have moved defendant's train, except for the violent opposition of the strikers. After the strike had continued for a period of 11 days it ceased, and all the late employés of the defendant who were engaged in the strike resumed work on the defendant's cars, and the defendant was restored to the possession of all its property and railroad and fixtures so taken possession of by the strikers; but the wages were not restored, nor other concessions made by the defendant.

If it had not been for those who had been in the employ of the defendant up to the time

of the commencement of the strike, the defendant could have overcome the resistance, and transported plaintiff's stock in due and ordinary time. As soon as the strike ceased, the defendant transported the plaintiff's stock to Buffalo, and there delivered it to the plaintiff, who took possession of it. The plaintiff suffered great damage from the delay, to recover which this action was commenced.

The trial judge, among other things, charged the jury "that if the strike had its origin in the minds of the defendant's employés, that it begun with them, and terminated when they were ready to end it, and that strangers—outside parties—joined them through sympathy or other cause, the defendant is not exempt, and the plaintiff may recover damages;" "that whether the delay in bringing forward this train arose because the defendant's engineers, brakemen, and firemen were on a strike, declining to work, and the company had not men to carry on its business, or that they would not do it, or suffer others to do it, even though they were active in their resistance, although they committed violence, if they were the servants or employés of the defendant, nevertheless it is imputable to the defendant in this case;" "that if the defendant's employés were willing to carry on the business, and other men, which have been mentioned, sought to prevent those who were willing to work from carrying on its business, and continuing their labor, and that it was effective and sufficient to prevent those who were willing from going into the employ of the company, and this combination was strong and powerful,—strong in its moral position, strong in its physical power to overmaster and control the situation, and prevent the company from bringing out its engines and starting out the trains,—and so extended from Cleveland to Buffalo, embracing Erie, it is no excuse for the delay, because, if the strikers were the defendant's employés, they represented the defendant; they were its servants and agents, and their acts were the acts of the corporation."

To all these portions of the charge defendant's counsel excepted; and he requested the judge to charge "that, if the jury believe from the evidence that the cattle were delivered in Buffalo at as early a day as was possible under all the circumstances in the case, they will find for the defendant;" "that if the jury believe from the evidence that on and after the twenty-first day of July, 1877, the railroad tracks, depots, and rolling stock of the defendant were taken forcible possession of by a body or bodies of armed men, among whom were some of its employés, and that they continued to hold possession thereof by force of arms for several days, by reason of which the delivery of the plaintiff's stock at Buffalo was delayed until August 4, 1877, the plaintiff cannot recover;" "that if the jury believe from the evidence that, under the circumstances, the defendant could not have moved the plaintiff's stock from Collinwood to Buffalo previous to the time it did without endangering life and property, then that the defendant was justified in delaying the delivery of the stock until it was actually delivered;" "that if the cause of the detention of the plaintiff's stock arose from forcible resistance of the late employés of the defendant, the defendant having at all times a sufficient force of faithful employés to have operated and run the defendant's road had it not been for such forcible resistance, then the plaintiff cannot recover;" "that, if any of the employés of the defendant joined the strikers, they ceased from that time to be employés of the company, and the defendant is not in any way responsible for their acts."

The judge declined to charge each of these requests, and the defendant's counsel duly excepted. The jury rendered a verdict for the plaintiff. The defendant appealed to the general term, and, from affirmance there, to this court.

D. H. McMillan, for appellant, Lake Shore & M. S. R. Co. Adelbert Moot, for respondent, Meyer Greismer.

EARL, J. We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this case. A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay, and to forward the goods to their destination; and so it has been uniformly decided. Wibert v. Railroad Co., 12 N. Y. 245; Blackstock v. Railroad Co., 20 N. Y. 48. In the absence of special contract, there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks, or disable the rolling stock, or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the men engaged in the violent and riotous resistance to the defendant were its employés, for whose conduct it was responsible; and in that holding was the fundamental error

committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service, or in any sense its agents for whose conduct it was responsible. They not only refused to obey its orders, or to render it any service, but they willfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employés who were willing to serve it. They became a mob of vicious law-breakers, to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights, and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that, as to such acts, they were the employés of the defendant, for whom it was responsible? If they had sued the defendant for wages for the 11 days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not if it be true that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that, they were not in its service, or seeking to promote its interests, or to discharge any duty they owed it, but they were engaged in a matter entirely outside of their employment, and seeking their own end, and not the interests of the defendant. The mischief did not come from the strike,—from the refusal of the employés to work,—but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here, upon the facts which we must assume to be true, there was no default on the part of the defendant. It had employés who were ready and willing to manage its train, and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence, which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused, has been held in several cases quite analogous to this, which are entitled to much respect as authorities. Railroad Co. v. Hazen, 84 Ill. 36; Railway Co. v. Hollowell, 65 Ind. 188; Railroad Co. v. Bennett, 89 Ind. 457; Railroad Co. v. Juntgen, 10 Ill. App. 295.

The cases of Weed v. Railroad Co., 17 N. Y. 362, and Blackstock v. Railroad Co., 1 Bosw. 77, affirmed, 20 N. Y. 48, do not sustain the plaintiff's contention here. If, in this case, the employés of the defendant had simply refused to discharge their duties or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions in those cases.

We are therefore of opinion that the judgment should be reversed, and a new trial granted; costs to abide the event.

All concur.

Limitation of liability to agreed valuation. Loss by negligence. Reduced freight rate on account of valuation. Liquidated damages. Parol evidence.

HART v. PENNSYLVANIA R. R. CO.

(112 U. S. 331, 5 Sup. Ct. 151.)

Supreme Court of the United States. Nov. 24, 1884.

In error to the circuit court of the United States for the Eastern district of Missouri.

Melville C. Day and G. M. Stewart, for plaintiff in error. E. W. Pattison and Newton Crane, for defendant in error.

BLATCHFORD, J. Lawrence Hart brought this suit in a state court in Missouri against the Pennsylvania Railroad Company, to recover damages from it, as a common carrier, for the breach of a contract to transport, from Jersey City to St. Louis, five horses and other property. The petition alleges that, by the negligence of the defendant, one of the horses was killed and the others were injured, and the other property was destroyed, and claims damages to the amount of $19,800. After an answer and a reply, the plaintiff removed the suit into the circuit court of the United States for the Eastern district of Missouri, where it was tried by a jury, who found a verdict of $1,200 for the plaintiff; and, after a judgment accordingly, the plaintiff has brought this writ of error. The property was transported under a bill of lading issued by the defendant to the plaintiff, and signed by him, and reading as follows:

"Bill of Lading.

"(Form No. 39, N. J.)

"Limited Liability Live-Stock Contract for United Railroads of New Jersey Division. (No. 206.)

"Jersey City Station, P. R. R. ——, 187--.

"Lawrence Hart delivered into safe and suitable cars of the Pennsylvania Railroad Company, numbered M. L. 224, for transportation from Jersey City to St. Louis, Mo., live-stock, of the kind, as follows: one (1) car, five horses, shipper's count; which has been received by said company, for themselves and on behalf of connecting carriers, for transportation, upon the following terms and conditions, which are admitted and accepted by me as just and reasonable:

"First. To pay the freight thereon to said company at the rate of ninety-four (94) cents per one hundred pounds, (company's weight,) and all back freight and charges paid by them, on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each; if cattle or cows, not exceeding seventy-five dollars each; if fat hogs or fat calves, not exceeding fifteen dollars each; if sheep, lambs, stock hogs, or stock calves, not exceeding five dollars each; if a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load. But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, and smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom.

"Second. Upon the arrival of the cars or boats containing said stock at point of destination, the shipper, owner, or consignee shall forthwith pay said freights and charges, and receive said stock therein, and unload the same therefrom; and if, from any cause, he or they shall fail or refuse to pay, receive, or unload, as aforesaid, then said company or other carrier, as the agent of such shipper, owner, or consignee, may thereupon have them put and provided for in some suitable place, at the cost and risk of such shipper, owner, or consignee, and at any time or times thereafter may sell the same, or any number of them, at public or private sale, with or without notice, as said agent may deem necessary or expedient, and apply the proceeds arising therefrom, or so much thereof as may be needed, to the payment of such freight and charges, and other necessary and proper costs and expenses.

"Third. When necessary for said stock to be transported over the line or lines of any other carrier or carriers to the point of destination, delivery of the said stock may be made to such other carrier or carriers for transportation, upon such terms and conditions as the carrier may be willing to accept: provided, that the terms and conditions of this bill of lading shall inure to such carrier or carriers, unless they shall otherwise stipulate; but in no event shall one carrier be liable for the negligence of another.

"Fourth. All live-stock transported under this contract shall be subject to a lien, and may be retained and sold for all freight or charges due for transportation on other live-stock or property transported for the same owner, shipper, or consignee.

"Fifth. This company's liability is limited to the transportation of said animals, and shall not begin until they shall be loaded on board the boats or cars of the company. The owner of said animals, or some person appointed by him, shall go with, and take all requisite care of, the said animals during their transportation and delivery, and any omission to comply herewith shall be at the owner's risk. Witness my hand and seal, this twentieth day of October, 1879.

"Lawrence Hart, Shipper. [L. S.]

"Attest: E. Butter. W. J. Charmers, Company's Agent."

At the trial the plaintiff put in evidence the bill of lading, and gave testimony to prove the alleged negligence, and how the loss and injury occurred. He then offered to show that the actual value of the horse killed was $15,000; that the other horses were worth from

$3,000 to $3,500 each; and that they were rendered comparatively worthless in consequence of their injuries. The defendant objected to this testimony, on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the bill of lading. The court sustained the objection and the plaintiff excepted. It appeared on the trial that the horses were race-horses, and that they and the other property were all in one car. It was admitted by the defendant that the damages sustained by the plaintiff were equal to the full amount expressed in the bill of lading. The court charged the jury as follows: "It is competent for a shipper, by entering into a written contract, to stipulate the value of his property, and to limit the amount of his recovery in case it is lost. This is the plain agreement that the recovery shall not exceed the sum of two hundred dollars each for the horses, or twelve hundred dollars for a car-load. It is admitted here by counsel for the defendant, under this charge, that the plaintiff is entitled to recover a verdict for twelve hundred dollars, and also, under the charge of the court, the plaintiff agrees that that is all. It is simply your duty to find a verdict for that amount." The plaintiff excepted to this charge. The errors assigned are that the court erred in refusing to permit the plaintiff to show the actual damages he had sustained, and in so charging the jury as to restrict their verdict to $1,200.

It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each; * * * if a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load." Then follow, in the first paragraph, these words: "But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, or smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are therefore assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond but within the control of the defendant, and therefore apply to loss through the negligence of the defendant. It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live-stock contract," and is confined to live-stock. Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed, was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight.

It is further contended by the plaintiff that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further. We are, therefore, brought back to the main question. It is the law of this court that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of

his servants. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; York Co. v. Central R. R., 3 Wall. 107; Railroad Co. v. Lockwood, 17 Wall. 357; Express Co. v. Caldwell, 21 Wall. 264; Railroad Co. v. Pratt, 22 Wall. 123; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Railway Co. v. Stevens, 95 U. S. 655.

In York Co. v. Central R. R., 3 Wall. 107, a contract was upheld exempting a carrier from liability for loss by fire, the fire not having occurred through any want of due care on his part. The court said that a common carrier may "prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter." In Railroad Co. v. Lockwood, 17 Wall. 357, the following propositions were laid down by this court: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. (2) It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) These rules apply both to carriers of goods and to carriers of passengers for hire, and with special force to the latter. The basis of the decision was that the exemption was to have applied to it the test of its justness and reasonable character. It was said that the contracts of the carrier "must rest upon their fairness and reasonableness," and that it was just and reasonable that carriers should not be responsible for losses happening by sheer accident, or chargeable for valuable articles liable to be damaged, unless apprised of their character or value. That case was one of a drover traveling on a stock train on a railroad to look after his cattle, and having a free pass for that purpose, who had signed an agreement taking all risk of injury to his cattle and of personal injury to himself, and who was injured by the negligence of the railroad company or its servants. In Express Co. v. Caldwell, 21 Wall. 264, this court held that an agreement made by an express company, a common carrier in the habit of carrying small packages, that it should not be held liable for any loss or damage to a package delivered to it, unless claim should be made therefor within 90 days from its delivery to the company, was an agreement which the company could rightfully make. The court said: "It is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy." It was held that the stipulation as to the time of making a claim was reasonable and intrinsically just, and could not be regarded as a stipulation for exemption from responsibility for negligence, because it did not relieve the carrier from any obligation to exercise diligence, fidelity, and care.

On the other hand, in Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, it was held that a stipulation by an express company that it should not be liable for loss by fire could not be reasonably construed as exempting it from liability from loss by fire occurring through the negligence of a railroad company which it had employed as a carrier. To the views announced in these cases we adhere; but there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established, and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent, Comm. 603, and cases cited; Relf v. Rapp, 3 Watts & S. 21; Dunlap v. Steamboat Co., 98 Mass. 371; Railroad Co. v. Fraloff, 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The

compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. This principle is not a new one. In Gibbon v. Paynton, 4 Burrows, 2298, the sum of £100 was hidden in some hay in an old nail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the proprietor that there was money in the bag. The defense was upheld, Lord Mansfield saying: "A common carrier, in respect of the premium he is to receive, runs the risk of the goods and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards or other methods of security, and therefore he ought, in reason and justice, to have a greater reward." To the same effect is Batson v. Donovan, 4 Barn. & Ald. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated, in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation. The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in Newburger v. Howard, 6 Phila. 174; Squire v. New York Cent. R. Co., 98 Mass. 239; Hopkins v. Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692; Belger v. Dinsmore, 51 N. Y. 166; Oppenheimer v. Express Co., 69 Ill. 62; Magnin v. Dinsmore, 56 N. Y. 168, 62 N. Y. 35, and 70 N. Y. 410; Earnest v. Express Co., 1 Woods, 573, Fed. Case. No. 4,248; Elkins v. Transportation Co., *81 Pa. St. 315; Railroad Co. v. Henlein, 52 Ala. 606, 56 Ala. 368; Muser v. Holland, 17 Blatchf. 412, 1 Fed. 382; Harvey v. Railroad Co., 74 Mo. 538; and Graves v. Railway Co., 137 Mass. 33. The contrary rule is sustained in Express Co. v. Moon, 39 Miss. 822; The City of Norwich, 4 Ben. 271, Fed. Cas. No. 2,761; U. S. Exp. Co. v. Backman, 28 Ohio St. 144; Black v. Transportation Co., 55 Wis. 319, 13 N. W. 244; Railroad Co. v. Abels, 60 Miss. 1017; Railroad Co. v. Simpson, 30 Kan. 645, 2 Pac. 821; and Moulton v. Railroad Co., 31 Minn. 85, 16 N. W. 497. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions. Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the abseuce of any statute.

As relating to the question of the exemption of a carrier from liability beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States, (a re-enactment of section 69 of the act of February 28, 1871, c. 100; 16 St. 458,) which provides that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, "shall lade the same, as freight or baggage, on any vessel, without, at the time of such lading, giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." The principle of this statute is in harmony with the decision at which we have arrived.

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading as evidence of the contract on which he sued. The distinct ground of our decision in the case at bar is that, where a contract of the kind, signed by the shipper, is fairly made, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives,

and of protecting himself against extravagant and fanciful valuations. Squire v. Railroad Co., 98 Mass. 239, 245, and cases there cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the circuit court is affirmed.

Special contract. Agreed valuation of goods. Live stock. Pleading. Variance. Liability for negligence, excluded as to certain matters. Common-law standard of duty. Cheap rate agreed on for a low class of accommodation. Special horse car. Notice of defect in car. Agent's authority to speak for shipper. Notice of company's rules, posted under Inter-State Commerce Act. Fright of animals. Waybill. Construction of bill of lading.

COUPLAND v. HOUSATONIC R. R. CO.

(61 Conn. 531, 23 Atl. 870.)

Supreme Court of Errors of Connecticut. Feb. 29, 1892.

Appeal from superior court, New Haven county.

Action by Charles Coupland against the Housatonic Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

S. E. Baldwin, for appellant. *J. W. Alling*, for appellee.

SEYMOUR, J. It appears from the record in this case that the answer to the complaint contained two defenses, to the second of which a demurrer was entered. The demurrer was sustained upon grounds so entirely peculiar to the particular case, and of no general applicability, that we need only say for the information of the parties that in our judgment the second defense contained nothing material not already sufficiently averred in the first defense; and that the defendant suffered nothing in consequence of the action of the court sustaining the demurrer. The complaint did not allege that the injury was occasioned by chafing or collision; on the contrary, it alleged another cause, which precluded such claim. Again, the first defense had already set out the bill of lading containing the agreement stated in the second defense, and had alleged that it was made with Parley A. Russell, who described himself as agent for the shipper. The record conclusively shows that the defendant was deprived of no advantage by the failure of the first defense to state more particularly than it did that the bill of lading was a contract between the plaintiff and the defendant. The court treated it as such, and in the charge to the jury tells them that it seems to be an undisputed fact that Mr. Russel. signed it as the plaintiff's agent. The defendant has no just ground to complain because the demurrer was sustained. At the trial the defendant introduced the following bill of lading which was set forth in its answers: "Housatonic Railroad. Great Barrington Station. April 25, 1891. In consideration of the Housatonic Railroad Co., and also in consideration of any corporation whose roads connecting therewith, receiving and carrying, viz., one horse, value $100; one colt, consigned to Rundle & White, Danbury, Conn., freight prepaid, the owner and shipper hereby agree that none of said corporations shall be liable for damage or loss of or to all or any part of said freight by reasons of breaking, chafing, weather, fire, or water, except where collision or running from the track, resulting from negligence of the corporation's agents, shall cause the same; and the shipper and owner hereby promise to pay the freight, and to claim no deduction therefrom by reason of any damage or loss. L. F. JONES, Station Agent. Signed in duplicates: PARLEY A. RUSSELL, Agent for shipper and owner."

The defendant requested the court to charge the jury that, inasmuch as the declaration charges the defendant merely as a common carrier, but the proof is that the mare and colt were shipped under a special contract, the proof does not support the declaration, and the verdict must be for the defendant. This the court declined to do, but charged that, in view of the complaint, and of all the pleadings, and of the evidence offered by the plaintiff, the suit was to be regarded as an action to recover of the defendant upon the ground for its negligence. The refusal of the court to charge as requested by the defendant was fully justified. If the animals had been shipped under a special contract, which undertook to completely exonerate the defendant from the consequences of its own negligence, the request would have been proper. But in this case there is no attempt on the part of the defendant to limit its common-law liability except by reason of breaking, chafing, weather, fire, or water, where collision or running from the track, resulting from negligence of the corporation's agents, does not cause the same.

It is argued by the defendant that the injuries which the mare sustained and which occasioned her death, namely, the breaking of a leg, and other severe injuries, occasioned by her being thrown down by a sudden side movement of the car, are properly described by the words "breaking" and "chafing" in the bill of lading, and are therefore injuries against which the defendant undertook to exempt itself from responsibility, even for its own negligence, unless such negligence caused collision or running from the track, which, in this case, it did not. Such argument is unsound. None of the words, "breaking, chafing, weather, fire, or water," used in the bill of lading to describe the occasion of the damage against which the defendant limits its liability, are apt or appropriate to describe the injuries complained of, nor injuries to live freight at all. It is evident the bill of lading used on this occasion was one ordinarily used for goods, wares, and merchandise, other than living animals, or, at any rate, was only appropriate for such property. In Camp v. Steam-Boat Co., 43 Conn. 333, twelve barrels of sugar and one tierce of rice were shipped under a bill of lading, which contracted to transport and deliver them in the order and condition in which received, the acts of God, public enemies, perils of sea and river navigation, collision, fire, and all other perils, dangers, and accidents not resulting from the negligence of the company or its agents, excepted. On the passage through Hell Gate the steam-boat struck on a rock and sprung a leak, whereby the goods were damaged. The plaintiff sued the steamboat company as common carriers, and

himself introduced the bill of lading in evidence. The defendants claimed and requested the court to instruct the jury that the contract between the parties, upon which they were alone liable, if at all, was expressed in the bill of lading, and that it was the duty of the plaintiff to set out in his declaration the contract and the exceptions as to liability as contained therein; that there was a variance between the declaration and the proof, and that the plaintiff, therefore, could not recover; and that the goods were received by the defendant not as common carriers, but under the contract contained in the bill of lading. The court declined so to instruct the jury, but instructed them that the plaintiff might recover, unless the defendants showed that the accident occurred through no want of reasonable care or prudence on their part. Upon a motion for a new trial for error in refusing to charge as requested, this court held that there was a fatal variance between the allegations of the declaration and the proof. It held it to be well settled that common carriers may stipulate for a less degree of responsibility than the common law imposes, and that, while the English courts hold that they may stipulate for entire exemption, even for their own negligence, the courts in this country differ only as to the extent to which public policy will allow the stringency of the ancient rule to be relaxed, and generally hold that they will reserve the right to pass upon the reasonableness of the particular contract made, and will not allow the carrier to exempt himself by special contract from the consequences of his own negligence or that of his agent. That case, however, differs from the case at bar. To be sure, the bill of lading in the latter undertakes to exempt the defendant from responsibility for all damage to freight by reason of breaking, chafing, weather, fire, or water, even though occasioned by its negligence, other than negligent collision or running off the track; and in respect to freight to which that contract applied we should hold that the contract for exemption from consequences of its own negligence could not be sustained. But there is no contract that the defendant shall be exempted from damages occasioned by its own negligence in failing to provide a suitable car, or for so transporting a mare that she is thrown down so as to break her leg, and receive other severe injuries, of which she dies. In respect to every injury except those caused by breaking, chafing, weather, fire, or water, or by collision or running off the track through the negligence of its agents, the defendant is subject to all the responsibilities of a common carrier. No attempt is made to limit such responsibilities. The bill of lading contains no contract respecting them.

The common-law rule which made carriers practically insurers of property while being carried by them has, however, from the very necessity of the case, been in a measure relaxed in the carriage of live-stock. As suggested in Edw. Bailm. § 680, the carrier can store away goods, so as to secure their safety; but a carrier of animals by a mode of conveyance opposed to their habits and instincts has no such means of securing absolute safety. They may die of fright; they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured; or they may kill each other by crowding, plunging, or goring; the motion of the cars, their frequent concussions, the scream of the engines may often create a kind of frenzy in the swaying mass of cattle; and the carrier is not held liable for injuries or losses arising from the irrepressible instincts of this living freight which he could not prevent by the exercise of reasonable care. While he is not an insurer against injuries arising from the nature and propensities of the live-stock carried by him, yet his liability is not limited to a careful conveyance of the cars containing them. He must provide, in advance, suitable means to secure their conveyance; and he must use those means with all reasonable diligence and forethought in the varying circumstances arising in the business. To apply these principles to the case before us: The plaintiff sued the defendant as a common carrier of live-stock. The defendant, as one defense, set up the bill of lading, and claimed that the mare and colt were shipped under its special provisions, which varied its ordinary liability, and therefore the proof did not support the declaration. The plaintiff claimed in reply that the injuries named in the bill of lading for which the defendant undertook to limit its liability did not refer to injuries to live-stock at all, and, if they did, no exemption was provided for the injuries complained of, and therefore, in respect to the care required in transporting and to injuries of the nature of and occasioned as those in question, the defendant took the mare and colt as common carriers simply, and not under a special contract. If this was true, there is no variance. The facts do not present a question of technical variance. The plaintiff does not set out one contract in his complaint and prove another. He claims to recover against the defendant as a common carrier, and introduces no proof inconsistent with such claim, and insists that the proof introduced by the defendant is not inconsistent with that claim. It is a question of construction of the contract contained in the bill of lading, and the court was right in instructing the jury that there was no such variance between the allegations and the proof as required a verdict for the defendant. The question was whether the bill of lading, properly construed, prevented the plaintiff from recovering from the defendant under its common-law liability as a carrier of live-stock. The court thought it did not, and we think the court was right.

The defendant insisted that, if its claim of variance was not sustained, then it was not to be held as an insurer of the property, it being live freight; that no recovery could be had except upon proof of its negligence; that it was not negligent in respect to the car used for transportation, nor for the injury that occurred through the mare's fright, etc., nor for refusing (which it said it did not) to take the car off at Ashley Falls; and that, if liable at all, the damage could be but $100.

That the defendant would not be held to be an insurer of the mare and colt we have already seen. Negligence on its part must be shown before the plaintiff can recover. And the instruction of the court to the jury,—that, if they found that the defendant was not guilty of either of the acts of negligence claimed, and so that the injury occurred by reason of the propensities of the animal, and its nervousness and fright, without negligence of the defendant, their verdict should be in its favor,—was unquestionable.

The next question relates to the law respecting the car furnished by the defendant for the transportation of the animals, and its acceptance by the agent of the plaintiff. The carrier is bound to furnish suitable, safe, and properly constructed cars in which to transport live-stock,—suitable in reference to the kind and value of stock carried. It is said that they cannot escape this obligation by calling attention to the defective condition of the car at the time the stock is received on board. If, however, the defect relates to the commodiousness of the car, and the possible effect of larger accommodations upon the particular animal to be carried, and the question is discussed between him and the carrier, who informs him that a more commodious car will be furnished if the shipper is willing to pay a larger rate of freight, (such larger rate not being unreasonable,) and the shipper decides to take the cheaper car, himself attempting to guard against the want of room, it is a matter to be considered. We cannot but think that the charge unduly limited the field of inquiry. It instructed the jury, as requested by the plaintiff's fourth request, that mere suspicion, without notice to Mr. Russell, (the shipper's agent,) "that the car offered for the transportation of the animals was not suitable for the purpose, and the mere use of the car after efforts on his part to guard against the defects in the car by padding the head of the mare and the cross-pieces, did not exempt the defendant from liability for loss caused while the animals were in the course of transportation by the defendant's negligence in furnishing such defective car, without proof of a distinct agreement on the part of Mr. Russell, as agent of the plaintiff, to assume the risk arising from the defects of the car." In the first place, the preamble that mere suspicion, without notice to the plaintiff's agent, that the car was not suitable, etc., was not adapted to the facts of the case, and might easily mislead the jury. It was not a case of mere suspicion without notice. The plaintiff's agent knew that the car in which it was proposed to ship the animals was an ordinary box freight-car. The finding states that it appeared in evidence that the said agent, before shipping said animals, saw the car which was used, and knew of the alleged defects in its construction, namely, of the alleged fact that the roof and rafters of said car were so low that a horse on lifting its head was liable to strike the same, and that said car was without stalls or partitions in the inside, and caused precautions to be taken for their protection by padding the rafters of the car, and placing a stuffed hood upon the mare, and by constructing a pen for the colt. Instead of a case of mere suspicion, it was a case of actual knowledge of the existence of the very defects which were claimed to constitute the defendant's negligence, and an attempt by the plaintiff's agent to guard against them. Then, again, it appeared in evidence that said agent was informed that the defendant had two special horse-cars, which were provided with passenger-car springs and buffers, and which had padded stalls and arched rafters, and that said animals could be shipped in one of those cars at the same rate and upon the same terms as by said box freight-car, upon payment of the additional sum of 10 cents per mile for the use of such special car. In other words, according to the defendant's claim, the plaintiff tendered a mare and colt, which he stated were worth $100, for transportation. Before the animals were shipped, the plaintiff saw the box-car in which they were subsequently shipped; knew of its alleged defects; was informed that the defendant had special horse-cars, free from the alleged defects, in which the animals could be shipped for an additional charge; did not avail himself of the special car, but attempted to remedy the defects of the box-car, and the animals were sent in it without his objection. Now, had not the jury a right to find, from these facts alone, that Mr. Russell, as agent of the plaintiff, assumed the risk arising from those defects of the car? It was not necessary to prove that he expressly said: "I see that the car is low from floor to roof, and I hear your offer of better accommodations for a higher price, but decline it, and will myself assume the risk arising from such defects of the box-car;" nor words of like import. His acts, viewed in the light of the surrounding circumstances, might evidence his assumption of the risk as clearly as his distinct agreement so to do. The defendant was bound to furnish a suitable car for the transportation of horses. It was still the duty of the jury to inquire whether it did so. If the box-car was unsuitable for the transportation of ordinary horses of the value placed by the plaintiff's agent on these, then the defendant might be liable though it informed the plaintiff of its better accommodations for a higher price. But if the jury found that the box-car was suitable for the ordinary business of transporting horses, though lower between joists than the special cars furnished at a higher price; that the plaintiff was aware of such defects, and was informed about such special cars, and the additional price charged for them was not unreasonable; and that, thereupon, he attempted to guard against the possible effect of the lower space, and acquiesced in the use of the car which was used,—then it was competent for them to further find, from such facts alone, that the plaintiff assumed the risks incident to the defect in question. We think the defendant was entitled to a charge to that effect, and that the instructions given were too restrictive in this particular.

We now come to consider the effect of a valuation by the shipper of the property offered for transportation. The plaintiff

requested the court to instruct the jury that the specification of value in the supposed bill of lading is insufficient to shield the defendant, if otherwise liable, from the full damages, if they were caused by its own negligence, as claimed by the plaintiff. The defendant, on the contrary, requested the court to charge that the plaintiff is bound by the valuation of the stock shipped at $100, stated in the contract, and could in no event recover more than that sum as damage for any injury to the same. The court declined to charge as requested by the defendant, and so stated to the jury, but instructed them as follows: "Where the injury to property is caused by the carrier's negligence, he is liable to the full value of the property, unless there was a distinct agreement, fairly obtained, that his liability should be limited to such agreed valuation. Applying these principles to the case, I charge you that, if the loss in question was caused by the negligence of the defendant as alleged, the defendant is liable for the full value of the goods, unless you find that there was a distinct agreement between the defendant and the plaintiff's agent, fairly obtained, limiting the defendant's liability to the valuation named in the release,—one hundred dollars. If you find that there was such an agreement, even though the loss was occasioned by the defendant's negligence, the defendant is liable for the injury to the property only to the amount of the value named in the release." Again, after calling attention to a claim that the plaintiff's agent signed the release without reading it, and stating that, nevertheless, if, when he signed it, it contained the statement of the value of the property, he is chargeable with a knowledge of such statement, the court adds: "But the release did not contain an express stipulation limiting the liability of the railroad company to the valuation stated in the release. I shall charge you that the mere act of signing this particular instrument by Mr. Russell, as the plaintiff's agent, without fraud or concealment on his part of the value of the goods, without any information that such statement of value would affect the liability of the company, and without supposing that it would, does not exempt the railroad company from liability beyond the valuation stated in the release for the loss or injury occasioned by the defendant's negligence." It is a rule established by some of the best authorities, and one which we recognize as expressing the law, that when a contract is fairly made between shipper and carrier agreeing on the valuation of the property carried, with the rate of the freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations of the property after a loss has occurred. Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151; Squire v. Railroad Co., 98 Mass. 239; Graves v. Railroad Co., 137 Mass. 33; Schouler, Bailm. § 457.

But we are met here with a further question. In case of loss through negligence of the carrier, is the shipper bound by the valuation which he, in answer to the carrier's inquiry, gave to the property when shipped, and which value was thereupon inserted in the bill of lading, although the bill of lading is silent as to the effect of such valuation upon the shipper's liability, and he had no actual information, and did not suppose, that his statement of value would affect the liability of the company in respect to the damage they would be liable to pay in case of loss? The defendant, as we have seen, claimed that the plaintiff was bound by the valuation he himself gave of the stock when it was shipped. The court said "No," unless there was a distinct agreement, fairly obtained, limiting the liability to such valuation; that, inasmuch as the bill of lading did not contain such express stipulation, the mere act of signing it by the shipper's agent, without fraud or concealment on his part of the value of the goods, and without supposing that his statement of value would affect the liability of the carrier, does not exempt the latter from liability beyond the valuation stated in the release. It is not clear what the court meant by the words, "without fraud or concealment," when charging that the mere act of signing the bill of lading by the agent, without fraud or concealment on his part of the value of the goods, etc. If the shipper, through his agent, signed a bill of lading in which the value of the property was stated, in accordance with his own valuation, at $100, which in fact, as he now claims, was worth $2,000, does the fact that his first valuation was an honest mistake affect the question of the carrier's liability? And is that the meaning of the charge? If he knew the mare to be worth a much larger sum when he gave her value at $100, there was, at least, concealment, even though he did not know or believe that such incorrect valuation would affect the carrier's liability for damage in case of loss, and perhaps thought it would only enable him to get a lower rate of freight. The court evidently meant to say, in effect, as appears from the entire charge, that, unless there was an express, distinct contract that the value placed upon the property should determine the amount of damages to be recovered in case of loss through the carrier's negligence, verdict should be rendered for the full value of the property lost. No case was cited by counsel where precisely that question was decided. That the valuation made by the shipper affects the care required to be taken of it in transportation by the carrier, without an express, distinct agreement to that effect, will not be questioned. No one but understands that his property, valued at $50, will get, and the law will require, less care and protection in transporting it than property valued at $1,000, and that he will pay less for such transportation, though it is of equal bulk.

Upon the question whether the carrier

was negligent in transporting the property, its value, as stated by the shipper, and relied on by the carrier, in the absence of anything which should cause him to discredit such valuation, would be conclusive, so far as value is an element of the inquiry. It has been held that, if the owner conceal the value or nature of the article, the carrier will not be liable for its loss. Thus, Judge Kent, (volume 2, pt. 5, § 40,) after stating the general rule that a common carrier is answerable for the loss of a box of goods though ignorant of its contents, and though those contents be ever so valuable, unless he has made a special acceptance, says: "But the rule is subject to a reasonable qualification, and, if the owner be guilty of any fraud or imposition in respect to the carrier,—as by concealing the value or nature of the article,—he cannot hold him liable for the loss of the goods. Such an imposition destroys all just claims to indemnity, for it goes to deprive the carrier of the compensation which he is entitled to in proportion to the value of the article intrusted to his care, and the consequent risk which he incurs; and it tends to lessen the vigilance that the carrier would otherwise bestow." Says Schouler, in his work on Bailments & Carriers, (section 423:) "A carrier is to be charged with no responsibility beyond what the thing appears on its face and the proof at command to deserve; and the sender, whose conduct induces him to relax his guard, or goes to deprive him of his just compensation, puts himself without the pale of justice." That the value of the article, as stated by the owner, is a proper element to be considered in measuring the care to be bestowed upon it by the carrier, is, we repeat, beyond question. The reasoning of the court in Hart v. Railroad Co., supra, tends very strongly to uphold the defendant's claim that, in the case of loss through its negligence, the plaintiff is bound by his own valuation of the property when delivered for transportation, though there was no express agreement to that effect. There was an express agreement in that case, but the court seems to discuss the question upon general principles. After quoting the above passage from Kent respecting it, it says: "This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even when the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight, and secure the carriage, if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume." The agreement as to value, in this case, stands as if the carrier had asked the value of the horse, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

It would seem as if good morals required that the same rule should hold good in respect to a statement of value made by a shipper; even though there is no express contract that any loss that might occur should be measured by such statement. A shipper should not be allowed to reap the benefit of his statement of value, the natural consequence of which causes the carrier to treat freight in a certain way, resulting in its loss, as would apply in case of an agreement that a statement of value should govern in case of loss. Actual notice, given by a common carrier to his customer, specifying the terms on which he receives and carries goods, becomes parcel of the contract when it is proved that the property was delivered on the terms thus offered. And, though it be not made the basis of a contract, it often becomes effective to shield the carrier from liability for things of special and peculiar value, not disclosed at the time of delivery; for it appears to be agreed that the carrier may in this manner require the shipper to state the nature or value of the property at the risk of having it received and carried as an article of ordinary value. The carrier does not impose an illegal condition. He asks for reasonable information bearing on the transaction; and the shipper is left free to act on his own discretion, accepting the legitimate consequences of his conduct. Edw. Bailm. § 569. Why is it not a legitimate consequence of his conduct to hold him to his own valuation when he sues for loss of the property so valued? And why may not the carrier require the shipper to state the nature or value of the property at the risk of being obliged to stand by the value so stated, in reliance upon which it has been accepted and carried, even though it be not made the basis of a contract, as well as at the risk of having the property carried as an article of ordinary value? We are inclined to hold that to be the law.

The defendant grounds another reason for appeal on the instructions that the plaintiff's agent was not chargeable with a knowledge or notice of the freight rules

of the defendant from the mere fact that they were hung up in the office, nor chargeable with knowledge of them, unless the jury were satisfied from the evidence that he had actual knowledge or some notice or information respecting them; and that, if he did not know them, and was not informed of them, it was not proper for the jury to decide from the rules themselves that he made a contract freeing the defendant from liability respecting the defects of the car, nor to consider them in ascertaining whether the plaintiff's agent entered into such an agreement; and, if they found no such agreement as described, the plaintiff was entitled to recover if they found the primary cause of the injury was the defendant's negligence in furnishing a suitable car, although, but for the nature and propensities of the animal carried, no loss would have resulted. These instructions referred to certain portions of a pamphlet containing the official classification of freight, and certain rules and terms for the transportation of freight, then in force on the road, which, for the information of shippers, was hung up in the defendant's freight office, though not in the office where people came to make their contracts for the shipment of freight. The instructions that the plaintiff was not chargeable with notice of the rules contained in the pamphlet upon facts stated was correct. A pamphlet hanging in a railroad company's office, containing rules and rates, is not, of itself, constructive notice of its contents. Nor is this a case for the application of the ordinary, but not universal, rule that full and adequate means of knowledge are equivalent to knowledge itself. It will not do to hold that, where a shipper and common carrier contract about the carrying of freight and the rate to be paid, without reference to the fact that there are printed rules upon the subject, and of the existence of which the shipper is ignorant, he shall be held to have constructive knowledge of the rules, even though the interstate commerce acts required them to be posted. The defendant claimed to have proved that the attention of the plaintiff's agent was called to these rules, and that they were explained to him. This the plaintiff denied; that a charge based upon both contentions was necessary, and was given. The remaining part of this reason for appeal has already been sufficiently discussed.

The next reason for appeal is that the court charged that if, in the course of transportation of the animals, the agents of the defendant in charge of the train were apprised or informed by the plaintiff's agent that the transportation was causing fright of the mare, whereby she was acting badly, and was in danger of being killed or hurt by further transportation, and if the defendant's agents were requested by plaintiff's agent to set the car on the side track at Ashley Falls, to prevent further danger to the mare, it was the duty of the defendant's agents so to do if it could reasonably have been done, and the neglect to do so would have been negligence on the part of the defendant. What actually occurred between the agents of the respective parties in this behalf was a matter of dispute, which was left to the jury to decide. The charge was correct. Most of the objections urged against it are answered by the limitation stated by the court, that it was the defendant's duty to have complied with the request if it could reasonably have been done. The charge was appropriate to the facts as claimed by the plaintiff. At the trial the defendant offered in evidence a way-bill in the ordinary form, containing the place and date of the consignment of the property, its destination, the name of the shipper and of the consignees, a description of the articles, their weight, value, and the rate and amount of expense, whether paid or unpaid. It appeared from the defendant's evidence that it was neither signed by nor shown to the plaintiff or his agent, but was made only for the convenience of the company, and was ordinarily given to the conductor of the train. Upon the plaintiff's objection, the court excluded the way-bill, and the defendant excepted. For what purpose it was offered, and for what reason objected to, nowhere appears. If we are at liberty to conjecture that it was objected to for all purposes, and can see that it was admissible for any, then it was wrongly excluded. In concluding whether the defendant was negligent because its agent declined to comply with the request to switch the car at Ashley Falls, (assuming that the jury found that such request was made,) the information contained in the way-bill delivered to him might be a proper element. As far as appears, it was his only source of information concerning the property. If asked to interrupt its transportation, he had a right to consult the way-bill as to its destination and value, and measure his actions, in some degree, upon its contents. What would be negligence in such a case in respect to very valuable property, might not be negligence in respect to property of little value. If the way-bill showed that the property was to be carried but a short distance further, he would have a right to take that into account. In short, for some purposes the way-bill was admissible evidence. If the decision of the case depended upon this point, we should hold that the record did not supply sufficient information to enable us to decide that the court erred.

The questions presented in this case are numerous, and some of them difficult and important. The conclusions we have reached upon the points in which we think the superior court erred entitle the defendant to a new trial, and we might have stopped there without considering the other reasons for appeal. But they would have been likely to reappear after the new trial, and it seemed best to settle the law of the case, so far as possible, now. As to the plaintiff's request to charge contained in the finding and enumerated in the plaintiff's bill of exceptions, what we have already said sufficiently indicates our opinion as to the duty of the court respecting all of them except one. We have necessarily discussed the grounds upon which they are based in discussing the points made in the defendant's appeal, and need not repeat the discussion nor the conclusions. If the same questions arise again,

we think they are fully answered. The one request to charge not yet referred to is plaintiff's request No. 9, that the court should charge the jury "that the statement of value in the so-called 'bill of lading' only affects the mare, and has no reference to the colt." We see nothing in the case to justify such a charge; nothing to indicate that it was anything but a question for the jury to say upon the facts, including an inspection of the bill of lading, whether the figures indicating $100 were meant to indicate the value of the mare and colt or only the value of the mare,—a question which the finding shows was in dispute. There is error in the judgment, and a new trial is ordered. The other judges concurred.

Injunction. Use of electric power on horse railroad. Notice of proposed location. Poles planted in highway. Distinction between steam and street railroads. Eminent domain. Additional servitude.

TAGGART et al. v. NEWPORT STREET RAILWAY CO.

(16 R. I. 668, 19 Atl. 326.)

Supreme Court of Rhode Island. Jan. 18, 1890.

Bill for injunction.

Julien L. Daires, Arnold Green, and *Patrick J. Galvin,* for complainants. *Francis B. Peckham* and *Darius Baker,* for respondent.

DURFEE, C. J. This bill is brought by the complainants as abutters on certain streets in the city of Newport along and over which the tracks or rails of the defendant company's street railway have been laid. The object is to have the company enjoined from erecting or maintaining certain poles and wires in the streets in front of their estates. Said poles were erected to support said wire over said tracks for the conduction of electricity, which is used as a motor for the passenger-cars traversing said tracks. The poles are placed along the margins of the sidewalks of said streets, about 120 feet apart, and were placed so by permission of the city council of the city of Newport, given by ordinance. The case was submitted on bill and answer, no replication having been filed. The bill alleges several grounds of relief. We will consider them severally, as alleged.

The first ground is that the company did not give notice as required by section 2 of the act of incorporation. Said section provides for notice to abutters, to be given by publication and posting, at least 14 days before the location of tracks proposed to be laid. The bill alleges that the purpose for which the notice was required was to apprise the abutters "of the nature and extent of the proposed use of the streets and highways," and to afford them an opportunity to appear before the city and town councils having power over the matter, and be heard in relation thereto. The bill admits that a notice was given in August and September, A. D. 1888, but avers that it was defective, in that it did not set forth that any other than horse-power was intended to be used. The answer states that said notice did not refer to the matter of power, and maintains that any reference to it therein was unnecessary, since section 2 prescribes notice only before action in regard to the location of the tracks. This is so. It is section 5 that relates to the power. That section provides that "said tracks or road shall be operated and used by said corporation with steam, horse, or other power, as the councils of said city and towns may from time to time direct." No notice is required before such direction. The ordinance in regard to location was passed January 24, A. D. 1889. It permitted the use of horse-power only. The ordinance permitting the use of electricity was passed March 5, A. D. 1889. It seems to us that the latter ordinance was clearly authorized by section 5, in the words above quoted. The previous location of the tracks was not affected thereby.

The second ground alleged is that the right to use electricity is not given. The language in regard to the power to be used is that above granted, namely, that the road shall be operated "with steam, horse, or other power, as the councils of said city and towns may from time to time direct." The complainants contend that the word "steam" must be struck out, because it has been decided that steam cannot be used without compensation to the owners of the fee for the new servitude imposed, and no compensation is provided for, and because, "steam" being struck out, "other power" must be construed to mean other power similar to horse-power, *i. e.*, other animal power. We do not find the argument convincing. Allowing that "steam" must be struck out for the reason given, it does not follow, in our opinion, that "other power" must be construed to mean other animal power. Horse-power is the only animal power which has ever been used for the traction of street railway cars in our northern cities, and it is the only animal power which could have occurred to the general assembly as fit to be used. The suggestion that "other power" may mean mules cannot be entertained. The act of incorporation was passed in the winter of 1885, when the idea that electricity might be brought into use as a motor was already familiar; and nothing seems more probable than that the words "other power" were inserted with a view to its possible employment. We do not think the second ground valid.

The third ground is that the erection of the poles on the sidewalks is, in effect, prohibited by the act of incorporation. The seventh section, which relates to the repairs of the streets where the tracks are, and to damages for negligence on the part of the company, concludes as follows, to-wit: "And said corporation shall not incumber any portion of the streets or highways not occupied by said tracks." The poles are certainly in a portion of the streets not occupied by the tracks; but do they "incumber" that portion, in the meaning of the word as it is used? To incumber, according to Webster, is "to impede the motion or action of, as with a burden; to weigh down; to obstruct, embarrass, or perplex." To incumber, as used in said section 7, doubtless means to obstruct or hinder travel, by putting things in the way of it. The poles are very slightly in the way of travel, being placed, as hitching posts, lamp-posts, electric light poles, telegraph and telephone poles are placed, near the front margins of the sidewalks. We are not inclined to say, however, that they do not incumber because they are placed as they are, but only that it does not follow that they incumber because they are so placed. Take, for instance, a lamp-post, or an electric light pole.

It is slightly in the way, and, if it served no useful purpose in regard to the street, might justly be deemed to incumber it. But it supports a lamp or an electric light which illuminates the street at night, and so improves the street for its proper uses. It is not, therefore, an "incumbrance," in any proper sense of the word. The real question is, as it seems to us, whether the words, "and said corporation shall not incumber any portion of the streets or highways occupied by said tracks," were intended to restrain the city council of the city of Newport from authorizing the use of electricity for a motor, in the manner in which it is used by the company. We have already decided that the council has power, by section 5, to authorize the use of electricity; so that the question relates only to the manner of using, and is whether the council has power to authorize the use in said manner. It seems to us that the provision that the tracks or road shall be operated by "steam, horse, or other power, as the councils of said city and towns may from time to time direct," is broad enough to empower said councils, not only to authorize the use of electricity as a motor, but also to authorize its use by means of any system of application which it approves as suitable; and it further seems to us that the concluding words of section 7 have their full meaning when applied to the company acting of itself, without extending them to city and town councils acting under section 5, or to the company acting under said section, as authorized by such councils. It appears that said concluding words were copied from charters of street railway companies which were only authorized to use horse-power, and in which, of course, they could have had no such application as is here contended for. It also appears from the allegations of the answer that the mode of using electricity which has been adopted is the only mode in which it can be successfully used by the company for the operation of the road.. These are things which confirm our view. Our conclusion is that the power conferred by section 5 is not qualified by the concluding words of section 7, and that the poles complained of, having been erected, under section 5, as part of the apparatus for supplying the railway with its motive power, are to be regarded, not as incumbering the streets, but as ministering to their uses, and as increasing the facilities for travel which they afford to the public.

The fourth ground alleged is that if the act of incorporation authorizes the use of electricity for the operation of said street railway, and the erection of the poles as ancillary thereto, it is unconstitutional and void because it authorizes the imposition of an additional servitude upon the streets, without providing for any additional compensation to the owners of the fee of said streets. We think it is settled by the greater weight of decision that a railroad constructed in a street or highway, and operated by steam, in the usual manner, imposes new servitude, and entitles the owner of the fee to an additional compensation, but that a street railway operated by horse-power, as such street railways are ordinarily operated, does not impose any new servitude, and does not entitle the owner of the fee to any additional compensation. Mills, Em. Dom. § 205, and cases cited; Ang. & D. Highw. § 91*d*, note 1, and cases cited; Newell v. Railway Co., 35 Minn. 112, 27 N. W. Rep. 839, also 25 Amer. Law Reg. (N. S.) 431, and cases cited in the note. The distinction is often stated as a distinction between steam and horse railroads, but the distinction properly rests, not on any difference in motive power, but in the different effects produced by them, respectively, on the highways or streets which they occupy. A steam railroad is held to impose a new servitude, not because it is operated by steam, but because it is so operated as to be incompatible with the use of the street, or, in other words, so as practically to exclude the usual modes of use. Pierce, R. R. 234. A steam railroad on a street, so operated as to be consistent with the use of the street in the usual modes, has been held not to impose a new servitude. Newell v. Railway Co., supra; Fulton v. Transfer Co., 85 Ky. 640, 4 S. W. Rep. 332. It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion. Briggs v. Railroad Co., 79 Me. 363, 10 Atl. Rep. 47. A steam railroad, as ordinarily operated, it has been said, comes into serious conflict with the usual modes of travel, and is a perpetual embarrassment to them, in greater or less degree, according as the business of the railroad is greater or less, or as the running of the trains is more or less frequent; whereas, the ordinary street railway, instead of adding a new servitude to the street, operates in furtherance of its original uses, and, instead of being an embarrassment, relieves the pressure of local business and local travel. Railroad Co. v. Heisel, 38 Mich. 62. See, also, Attorney General v. Railroad Co., 125 Mass. 515; Citizens Coach Co. v. Camden H. R. Co., 33 N. J. Eq. 267; Elliott v. Railroad Co., 32 Conn. 579; Hobart v. Railroad Co., 27 Wis. 194. The only considerable privilege which the horse-car has over other vehicles is that, being confined to its tracks, it cannot turn aside for other vehicles, while they are forced to turn aside for it; but this is an incidental matter, insufficient to make the horse railroad a new servitude. Shea v. Railroad Co., 44 Cal. 414.

The street railway here complained of is operated neither by steam nor horse power, but by electricity. It does not appear, however, that it occupies the streets or highways any more exclusively than if it were operated by horse-power. The answer avers that "electricity, besides being as safe and as easily managed as horse-power for the propulsion of street-cars, is more quiet, more cleanly, and more convenient than horses, both for residents on the streets used by said cars, and for the public generally, and also causes much less wear and injury to the

streets and highways than is occasioned by street-cars of which horses are the motive power." These averments, the case being heard on bill and answer, must be taken as true. We see no reason to doubt their truth. It is urged that electricity is a very dangerous force, and that the court will take judicial notice of its dangerousness. The court will take judicial notice that electricity, developed to some high degree of intensity, is exceedingly dangerous, and even fatally so, to men or animals, when it is brought in contact with them; but the court has no judicial knowledge that, as used by the defendant company, it is dangerous. The answer denies that it is dangerous to either life or property. It is also urged that the cars, moving apparently without the application of external force, alarm and frighten horses. This, so far as it is alleged in the bill, is denied in the answer. We see no reason to suppose that this form of danger is so great that on account of it the railway should be regarded as an additional servitude. The answer alleges that a great many street railways operated by electricity, in the same manner as the railway of the defendant is operated, are in use in various towns and cities in different states, and that many others are in process of construction.

Reference has been made to cases which hold that telegraph or telephone poles and wires erected on streets or highways constitute an additional servitude, entitling the owners of the fee to additional compensation; and from these cases it is urged that the railway here complained of is an additional servitude, by reason of the poles and wires which communicate its motive powers. There are cases which hold as stated, and there are cases which hold otherwise. But, assuming that telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the service of said street railway likewise create a new servitude. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or, if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets, as such, in that they communicate the power by which the street-cars are propelled. It has been held, for reasons which we consider irrefragable, that a telegraph erected by a railroad company, within its location, for the purposes of its railroad, to increase the safety and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally acquired. Telegraph Co. v. Rich, 19 Kan. 517. Our conclusion is that the complainants are not entitled to the relief prayed for on the ground alleged, and that the bill be dismissed, with costs.

Cf. Halsey v. Rapid Transit Street Railway Co. (1890) 47 N. J. Eq. 380, 20 Atl. 859; Rafferty v. Central Traction Co. (1892) 147 Pa. St. 579, 23 Atl. 884; Koch v. North Avenue Railway Co. (1892) 75 Md. 222, 23 Atl. 463.

Equity. Review of findings of fact by trial court. Ordinance granting right to build way creates contract with company. Condition subsequent. Repeal and confiscation. Receiver. Intervening petition. Removal of tracks. Parties. City attorney. Account. Reference to master. Demand for a jury.

CITY OF BELLEVILLE v. CITIZENS' HORSE RY. CO.

(152 Ill. 171, 38 N. E. 584.)

Supreme Court of Illinois. Oct. 22, 1894.

Appeal from appellate court, Fourth district.

Bill by J. D. Perry and L. G. McNair against the Citizens' Horse-Railway Company, the city of Belleville, and John Thomas for foreclosure of a mortgage and other relief. The city of Belleville filed an intervening petition. A decree was rendered foreclosing the mortgage, and granting the prayer of the intervening petition, but this decree, so far as the intervening petition was concerned, was revised by the appellate court. 47 Ill. App. 388. The city appeals. Reversed.

The Citizens' Horse-Railway Company, appellee herein, was granted the right and privilege of laying its track and operating its road along certain streets in the city of Belleville, under and by virtue of an ordinance passed December 21, 1885. Section 1 granted the right and named the route. Section 2 required the company to pay owners of abutting property damaged, if any, by reason of the construction of the road. Section 3 provided that the rights granted to the company were subject to the right of the city to use, improve, and repair the streets, "and to make all necessary police regulations concerning the management and operation of said railroad." Section 4 provided that the streets should not be obstructed longer than was necessary, and that the road must be constructed and operated within a certain time. Section 5 required the company to keep the streets in repair between the rails of its tracks. Section 6 provided that all rights theretofore granted to the Belleville Railway Company should be granted and renewed to the appellant, as its successor. Section 7 regulated the passenger fare. Section 8 provided that, "upon the failure of said company to comply with any condition herein named, the said council shall have the power which it hereby expressly reserves to repeal the ordinance and revoke the consent hereby given." It also provides that the right herein granted shall be forfeited as to such portion of the streets as are not used within two years. Section 9: "If said company shall fail to operate the said horse railroad regularly for a period of thirty days, or fail to run a car over said road to pass a given point at every fifteen minutes at regular intervals in the day time, unless said failure is caused by accident to its property in said city or its route therein, the rights and privileges hereby granted shall at once cease and determine, and unless said company within sixty days thereafter shall remove its tracks, turnouts and switches from the streets then occupied by said railroad, and put said streets in good repair, the said tracks, turnouts and switches shall be forfeited to said city." Another ordinance, passed October 4, 1886, required that the company should run its cars where its track passed any railroad depot, so as to make connection with passenger trains. Another ordinance, passed July 21, 1890, required that the company should run a car east from its west terminus at half past 9 and half past 10 o'clock every night, and from its east terminus at 10 and 11 o'clock every night.

The appellant, on the 7th day of October, 1886, made and executed its trust deed to J. D. Perry and L. G. McNair on all of its property, privileges, etc., to secure $25,000 of bonds issued by the company for the construction and equipment of its road, which drew 6 per cent. interest, payable semiannually. No interest having been paid on the bonds, the trustees, on the 11th day of September, 1891, filed a bill in the circuit court of St. Clair county to foreclose said trust deed, declaring the whole debt due under the provisions of the trust deed, averring the insolvency of the company, and making the company, John Thomas, who was alleged to be the sole owner of the bonds and coupons, and the city of Belleville, parties defendant (the latter on the ground that it had threatened, and was threatening, to tear up and destroy the track of the company), prayed for a strict foreclosure, the appointment of a receiver, and asked for a writ of injunction to restrain the city of Belleville from executing its threats. A temporary injunction was granted, and John Thomas was appointed receiver on the 21st of September, 1891, and he took possession of and operated the road. Thomas soon resigned, and Ryder was thereafter appointed, and he continued to operate the road. Prior to the filing of the bill, complaint was made by the city that the company was not keeping the track in repair; and on the 18th day of June, 1891, the president of the company was served with written notice to repair at once the track along Main, Illinois, and Charles streets. At a meeting of the city council, on the 8th day of September, 1891, it was ordered that the officers of the company be served with notice to appear at a council meeting to be held September 21st, to show cause why the ordinance granting the company the right to lay its track and operate its road should not be repealed. Notice was served on the company on the 10th day of September. At the meeting on September 21, 1891, an ordinance was offered repealing all ordinances relating to the rights and privileges granted to the appellant; but the consideration of the same was postponed until a meeting of the council on the 4th day of January, 1892, when it was taken up and passed, at which time, as heretofore stated, the road was in the hands of the receiver.

The repealing ordinance, after referring to and reciting those portions of the ordinances heretofore mentioned, granting rights and privileges to the company, and imposing certain duties, and to the powers reserved of repealing the same, provides as follows:

"Inasmuch, therefore, as the Citizens' Horse-Railway Company did not reasonably comply with the duties and obligations imposed by sections 5 and 9 of said Ordinance No. 185, nor with the duties and obligations imposed by Ordinances Nos. 275, 201, 446 and 171, therefore, be it ordained by the city council of the city of Belleville, Illinois:

"Section 1. That Ordinances Nos. 446, 185, 171, 201 and 275, and all ordinances in relation to the Citizens' Horse-Railway Company, except Ordinance No. 287, be, and the same are hereby, repealed, and all the rights and privileges by said ordinances granted, are hereby revoked.

"Sec. 2. That the city clerk be instructed to notify the said Citizens' Horse-Railway Company to remove its tracks, switches and turnouts from the streets of the city of Belleville, within sixty days after the passage of this ordinance.

"Sec. 3. That if said tracks, switches and turnouts be not removed within sixty days after the passage of this ordinance, and such notice shall have been given, as is provided in section 2 of this ordinance, that the same are hereby declared forfeited to the city of Belleville, and the street inspector be instructed to remove the same."

On the 16th day of March, 1892, the city of Belleville filed its petition in the foreclosure suit, averring that the company had not complied with the ordinances of the city, wherefore it had passed the repealing ordinance above noted, which had not been observed by the company; and it concluded with the following prayer: "In consideration of the premises, your petitioner asks leave of this honorable court to remove the tracks, turnouts, switches, etc., of said Citizens' Horse-Railway Company or said street railway from the streets of said city of Belleville." A motion made by the complainants in the foreclosure proceeding to strike the petition from the files was overruled by the court. On the 31st day of March, 1892, the city of Belleville filed its answer to the original bill, denying all the material allegations of the bill, except that part charging that it threatened and intended to tear up and remove the track of the company, which it averred, and affirmed its right to do under and by virtue of its ordinances. The company and trustees answered the petition of the city of Belleville, denying the facts in it stated, and also the right of the city to repeal said ordinance and remove the tracks, and averring that the remedy, if any, was at law. The answer also averred that it was contemplated to change the motive power, and put in an electric line, and repair and renew the old line; that, if that was not permitted, then that the Citizens' Horse-Railway Company, or those interested in it, were ready and willing to comply with every condition contained in ordinances under which said road is now being operated; that the earnings of the Citizens' Horse-Railway Company are not sufficient to make repairs on said road, but, if the court required it, the Citizens' Horse-Railway Company is ready and willing to give a good and sufficient bond, to be approved by the court, in such an amount as it might determine, conditioned for the faithful performance of all the conditions and obligations contained in said ordinances, and to improve, repair, and keep in constant repair, the said road, tracks, cars, etc. The trustees and the railway company, after the cause was at issue, moved the court to refer the whole matter to the master to state the account of indebtedness, and also to take evidence on the petition, and to report the same to the court, which motion was overruled; whereupon the same parties moved that a jury be called to try the issue on the petition, which motion was also overruled. The cause was heard on the bill for foreclosure, answer, and replication, and also upon the intervening petition of the city of Belleville, and the answers of Perry and McNair, the trustees, and of the Citizens' Horse-Railway Company thereto, and the replications of the city of Belleville to such answers, and the evidence.

The findings of the court were, in substance, as follows: That the Citizens' Horse Railway Company, for a long time, failed to operate its street railway in compliance with the terms and conditions under which the company had a right to operate a road in the city of Belleville, and that said company also failed to keep its track and roadbed in proper and good repair; that it was notified to appear and show cause why its rights and privileges under the ordinances of the city should not be revoked; that the repealing ordinance was passed as alleged; and that the company had failed to remove its tracks, and that the tracks are out of repair, and in bad condition, etc.; that said trust deed was a valid lien on all the property rights, etc., of the railway company; that the trustees were entitled to a decree of foreclosure for the entire debt, which was found to be $33,250, all of which debt is due to George Atterbury; that the company is insolvent, and the property not of the value of the debt; and that the property would be taken for the debt, and the debt discharged; and that no benefit would arise from a sale being made,—from which findings the court decreed: First. That the Citizens' Horse Railway Company take up and remove its tracks from the streets of the city of Belleville within 60 days from May 2, 1892, and, on failure to do so, the city is authorized and empowered to remove such tracks, etc. Second. It is decreed that the receiver pay certain expenses made by him out of funds in his

hands, or that may come to his hands, which are declared a prior lien to the bonded indebtedness. Third. That the company pay George Atterbury, the sole owner of the bonds, $33,250, within three months from the date of the decree, and certain other small amounts to other parties; whereupon, if paid, the trustees are to reconvey the property to the company, but, on default, the company to be forever barred, and George Atterbury to get the title to and possession of the road from any one in possession thereof, on the production of a certified copy of the decree, under penalty of contempt for any one failing to comply, and the company to make him a deed of conveyance for "each and all of its property, both real and personal, powers, rights, and privileges, and franchises heretofore described as belonging to said company."

The Citizens' Horse-Railway Company appealed to the appellate court, and assigned the following errors: (1) The circuit court erred in deciding that the city could, before any judicial examination or adjudication that the railway company had violated any of the rights, powers, privileges, and franchises granted it by the ordinances of said city to operate its railway, pass an ordinance revoking such rights, powers, privileges, and franchises, and forfeiting the property of said railway company to said city. (2) The circuit court erred in decreeing a forfeiture against the railway company in this proceeding, and in not striking the petition of the city from the files. (3) The circuit court erred in finding and decreeing a forfeiture against the Citizens' Horse-Railway Company on the evidence of the record. (4) The circuit court erred in deciding that there was any evidence to authorize a forfeiture under the grounds specifically declared as authorizing a forfeiture by Ordinance No. 185. (5) The circuit court erred in improperly admitting all the evidence as to the condition of the roadbed and tracks after September 22, 1891, the date when the receiver took possession of the railway. (6) The circuit court erred in denying the motion to impanel a jury to hear and determine all the questions of fact raised on the petition filed by the city, and in refusing to refer said petition, as well as the original suit, to the master in chancery, to take and report all evidence offered by either party to the court before final hearing. (7) The circuit court erred in decreeing a forfeiture without the railway company or the owner of the mortgage bonds being made parties to the petition filed by the city. (8) The circuit court erred in holding that the city attorney had any power or authority from the city council to file the petition on which a forfeiture was declared. The judgment of the appellate court reversed that part of the decree from which the appeal was prosecuted, and remanded the cause, with directions to strike the petition of the city of Belleville from the files (Citizens' Horse Ry. Co. v. City of Belleville, 47 Ill. App. 388); and therefore the city appealed to this court.

August Barthel, James A. Farmer, and Turner & Holder, for appellant. J. M. Hamil, for appellee.

BAKER, J. (after stating the facts). In our opinion, the evidence establishes these facts: That, for a period of more than one year prior to its going into the hands of a receiver, the Citizens' Horse-Railway Company, appellee, did not comply with the provisions of section 5 of Ordinance No. 185, by keeping in repair so much of the streets as is between the rails of its tracks. That during said year or more it frequently, if not continuously, failed to operate its railroad regularly for a period of 30 days, thereby violating one of the requirements of section 9 of the ordinance; and it is to be noted that what this provision denounces is not an entire failure to operate the road in any way whatever for a period of 30 days, but a failure "to operate the road regularly for a period of thirty days." The word "regularly" is defined as meaning in a regular manner; in a way or method accordant to rule or established mode; in uniform order; methodically; in due order. And such is the signification attached to the word in its common and ordinary use. The appellee had, in violation of another requirement of section 9, failed for said period of more than a year to run a car over its road, or any portion of it, so as to pass a given point at least every 15 minutes, at regular intervals, in the daytime, and such failure was not the result of an accident to its property or to its route. That appellee, during said period, wholly failed to comply with the provisions of Ordinance No. 275, which required it to run a car starting from the terminus of its railroad in the west end at half past 9 o'clock every night, a car starting from the railroad's eastern terminus, at the Louisville & Nashville Railroad depot, at 10 o'clock every night, and a car starting from said west end at half past 10 every night, and a car starting from said eastern terminus at 11 o'clock every night. That, since appellee had been in charge of a receivership, neither of its receivers had complied with, or attempted to comply with, any of the provisions above referred to, of the ordinances of the city. That on June 18, 1891, the city of Belleville served a written notice on appellee, and on divers and sundry occasions, both prior and subsequent to that date, notified it of its failures to conform to the provisions and requirements of the ordinances, and requesting it to comply therewith. That a written notice was served on appellee to appear before the city council of the city of Belleville, at a designated time and place, and show cause why the city should not avail itself of its right to repeal Ordinance 185 and Ordinances 171, 275, and 446, and re-

voke the rights thereby granted. And that appellee, by its agents and attorneys, did appear before the city council; and, failing to show any reasonable cause or excuse in the premises, Ordinance No. 315, repealing Ordinances numbered 171, 185, 201, 275, and 446, was passed, and appellee ordered to take up its tracks, switches, etc., within 60 days.

It appears from the findings and decree of the circuit court that it found the above-stated facts substantially as we have found them. The appellate court reversed the decree; and counsel for appellee assumes that it found the facts otherwise, and the claim is made that the findings of the appellate court as to questions of fact, and mixed questions of law and fact, are final, and not subject to review in this court. Such is not the law. In chancery cases the finding of facts by the appellate court does not bind the supreme court, and in reviewing chancery cases the supreme court will determine controverted questions of fact from the evidence found in the record. Fanning v. Russell, 94 Ill. 386; Hayward v. Merrill, Id. 349; Railroad Co. v. Healy, Id. 416; Stillman v. Stillman, 99 Ill. 196; Moore v. Tierney, 100 Ill. 207; French v. Gibbs, 105 Ill. 523.

Counsel for appellee also confounds, in his printed brief, licenses and contract rights with franchises, and the result is that he arrives at what we deem a wrong conclusion in respect to the present controversy. The contentions of appellee in this behalf are that it derived from the ordinance of the city its franchises, or part of its franchises; that the city had no judicial authority to declare and enforce a forfeiture of its franchises; that a court of chancery had no jurisdiction so to do; and that a cause of forfeiture of a franchise cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose, at law, by quo warranto against the corporation. Blackstone says (book 2, c. 3, *37) that a franchise is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject; that, being derived from the crown, it must arise from the king's grant, or be held by prescription, which presupposes a grant. In Chicago City Ry. Co. v. People, 73 Ill. 541, this court said that corporate franchises in the American states emanate from the government or the sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are invested in individuals or a body politic. The proposition which is the foundation of appellee's claim was expressly decided, and decided adversely to such claim, in the case last cited. It was there held that where a street-railway company is incorporated under an act of the legislature, with power to construct, maintain, and operate a railroad in a city, upon the consent of the city, and in such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing and operating the same upon a certain street, the grant by the city is a mere license, and not a franchise. To the same effect are the subsequent cases of Board of Trade v. People, 91 Ill. 80; Railroad Co. v. Dunbar, 95 Ill. 571; City of Quincy v. Bull, 106 Ill. 337; and Chicago Municipal Gaslight & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616. And in this latter case it was also held, that the privilege of the use of the streets of a city or town, when granted by ordinance, is not always a mere license, and revocable at pleasure; that if the grant is for an adequate consideration, and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a valid and binding contract; and that the same result is reached where, prior to its revocation, the license is acted upon in some substantial manner, so that to revoke it would be inequitable and unjust.

Appellee places much reliance upon the decision of the supreme court of Wisconsin in State v. Madison St. Ry. Co., 72 Wis. 612, 40 N. W. 487, where it was held that a municipal ordinance granting to a street-railway corporation a franchise to occupy and use public streets, for the purposes of its railway, has the force and effect of a statute of the state; and that, for a violation of the provisions of such ordinances, an action could be maintained to vacate the charter or annul the existence of such corporation. The decision was based upon a statute of that state, and cannot be regarded as authority here; but, had it been decided on common-law grounds, there is nothing in the case that would justify us in overturning the settled law of this state, as announced in a long line of decisions.

Ordinance No. 185, passed December 21, 1885, was a contract, and one under which appellee had vested rights; but it contained conditions subsequent, which made it determinable under certain circumstances. It was provided in section 8 of the contract that, "upon the failure of said company to comply with any condition herein named, the said council shall have the power which it hereby expressly reserves to repeal the ordinance and revoke the consent hereby given"; and, in section 9, that in certain specified contingencies "the rights and privileges hereby granted shall at once cease and determine." It was in plain violation of these conditions subsequent that appellee did not keep the streets in repair between the rails of its tracks; that it failed to operate the horse railroad regularly for numerous periods of at least 30 days each; and that it failed, for more than a year prior to the appointment of a receiver, to run a car over its road, or any portion of it, so as to pass a given point at least every 15 minutes, at regular intervals, in the daytime,—when such failures were not the results of accidents to its property or its route. These matters were

all expressly named in the contract as conditions; and appellee agreed that if it failed to comply with them, or any or either of them, then the rights and privileges granted it by the ordinance should at once cease and determine, and the city should have the power to repeal the ordinance, and revoke the license and consent given for occupation and use of the streets for the purposes of the railway. These failures on the part of appellee did not of themselves avoid the contract, but they put it in the power of the city to rescind it. It is entirely competent for parties to a contract to introduce into it a provision that, if one of them fails to fulfill certain specified terms, the other shall be entitled to treat the agreement as at an end. There is a difference between this mode of discharging a contract and that by breach. When the parties have agreed that one of them shall have an option to dissolve the contract if certain of its terms are not observed, upon the nonfulfillment of the specified terms the party may exercise his option; and, if he elects to treat the contract as at an end, it will be discharged. But when a term of the contract is broken, and there is no agreement that the breach of that term shall operate as a discharge, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the contract; for, if it is not, the contract will not be discharged. 3 Am. & Eng. Enc. Law, p. 893, note 5; Head v. Tattersall, L. R. 7 Exch. 7. The contract at bar was of the kind first mentioned above. It contained provisions which made it determinable under certain circumstances at the election of the city. And how was the city to indicate its election to avoid the contract? Manifestly, by passing an ordinance repealing the ordinance that constituted the contract, and revoking all the rights and privileges granted thereby, and by notifying appellee to remove its tracks, switches, and turnouts from the streets of the city. All this was done. The contract between appellee and appellant was thereupon at an end. Of course, section 3 of the repealing ordinance was void. The city had no authority, without the judgment of a court, to forfeit to its own use the tracks, switches, and turnouts of the railway company. Baldwin v. Smith, 82 Ill. 162. But there was no attempt to enforce it. The remaining sections are complete in themselves, and so distinct and separately enforceable that they may be enforced without regard to section 3. They, therefore, are not invalid. Nelson v. People, 33 Ill. 390; Donnersberger v. Prendergast, 128 Ill. 229, 21 N. E. 1. The case of Pacific R. Co. v. City of Leavenworth, 1 Dill. 393, Fed. Cas. No. 10,649, is very like this. There an ordinance and contract, special in their terms, were construed to give the city a right to re-enter and take possession of the street, and remove the railroad track on the failure of the company to comply with the conditions of the ordinance granting to it the right of way. Dillon, J., in disposing of the case, said: "I refuse the instruction, on the ground that the company is in default, and the city is only pursuing a remedy which is given to it by the contract of the parties."

The city, in the petition which it filed in the foreclosure suit, did not ask the court to forfeit the franchises of appellee, or even the license or contract for the right of way on its streets. This latter had already been abrogated by its own act. It merely stated the facts in regard to the ordinance, the defaults of the company in respect to the conditions therein, and the passage of the repealing ordinance, and asked leave of the court to remove the tracks, turnouts, switches, etc., from the streets of the city. Since the property in question was under the jurisdiction and in the care and custody of the court of chancery, the petition was entirely proper and absolutely necessary. Nor did the court assume to decree a forfeiture of either the franchises of the railway company, or of the license from or contract with the city. It merely found the facts, and granted the relief that the city was justly and equitably entitled to receive.

It is objected that the city did not in its petition make either appellee or any other person or persons parties defendant. Whether or not this was essential it is unnecessary now to decide. At all events, appellee filed an answer to the petition, and there was a replication to the answer, and the matter was heard upon the pleadings and proofs, and appellee cross-examined the witnesses of appellant, and introduced witnesses and other evidence in its own behalf. So, the formal defect in the petition, if it was a defect, was waived, and appellee enjoyed all the rights and privileges of a defendant, and was not injured by the omission.

It is objected that the city attorney did not have any power or authority from the city council to file the petition on which a forfeiture was declared. No forfeiture was declared; and, in the absence of anything to show the contrary, it will be presumed that the city attorney was authorized to appear on behalf of the city.

It is objected that the court denied the motion to refer the original bill and the intervening petition to the master in chancery, to take and report evidence. There was no account to state, other than making a computation of the amount due on the bonds and mortgage; and it is not perceived that it was not within the judicial discretion of the chancellor to hear the witnesses himself, instead of having their testimony taken by the master.

It is urged that the court improperly denied the motion to impanel a jury to hear and determine all the questions of fact raised on the petition filed by the city. It does not appear that any issue was formed that gave appellee the right to demand a jury. Be-

sides this, the motion was not made in apt time, but on the same day and immediately before the cause was heard by the chancellor, and while the numerous witnesses were in attendance for examination.

We find no error in the record made in the circuit court. The judgment of the appellate court is reversed, and the order and decree of the circuit court are affirmed. Judgment of appellate court reversed. Decree of circuit court affirmed.

PHILLIPS, J., took no part in the decision of this cause in this court.

Road illegally located. Right of private citizen to ask injunction. Lapse of franchise from failure to build road in time limited. Condition subsequent. Grant of franchise by municipal corporation. Vested right. Legislative impairment. Mortgage of road.

HOVELMAN v. KANSAS CITY HORSE R. R. CO.

(79 Mo. 632, 20 Am. & Eng. R. R. Cases, 17.)

Supreme Court of Missouri. Oct. Term, 1883.

Appeal from circuit court, Jackson county; F. M. Black, Judge.

John C. Tarsney, for appellant. John K. Cravens, for respondent.

NORTON, J. This case is before us on appeal from the judgment of the circuit court of Jackson county, perpetually enjoining defendant from constructing and operating a horse railroad on Eighteenth street in Kansas City.

It appears from the record that the Union Depot Horse Railroad Company became a corporation in 1872, and was organized, as stated in the articles of association, "for the purpose of constructing, operating and maintaining a horse railroad from the junction of Main and Delaware streets, in Kansas City, to the Union Depot in said city, and thence to the Union Stock Yards, in West Kansas City;" that on the 9th day of September, 1873, the city council of said city passed an ordinance granting the right of way to said horse railroad company over certain streets in said city, including among the number, Eighteenth street from the eastern limits of the city to Main street, and authorizing it to construct and operate a horse railroad on said street; that prior to 1874 the said company had constructed its road over all the streets named in said ordinance except Eighteenth street, and except that part of Main street between Eighteenth and Eleventh streets; that in 1873 the said company made a deed of trust to secure the payment of 120 bonds issued by said company for $500 each, in which they conveyed to the trustee therein named, all of said company's real estate, rolling stock, houses, depots, rights of way, franchises, etc.; that default was made in the payment of said bonds, and the sheriff of Jackson county, as trustee, and in pursuance of a power given by said deed, sold in 1875 the property mortgaged, and by deed conveyed the same to one Dye, who was the purchaser at said sale, including in said conveyance all the right of way mentioned in said ordinance, except that over Eighteenth street, and that over Main from Eighteenth street to the Junction of Main and Delaware; that said Dye, in 1875, conveyed to the Kansas City Horse Railroad Company, a corporation duly organized for the purpose of operating a horse railroad in Kansas City and its vicinity, and the defendant in this suit, all that was conveyed to him by said sheriff; that the said Kansas City Horse Railroad Company, claiming in virtue of the aforesaid sale to be possessed and the owner of the right of way over Eighteenth street, commenced in 1881 constructing its road on said Eighteenth street, when plaintiffs, who are the owners of lots abutting on said street, filed their petition in this cause setting up substantially the above facts, and further alleging that the Union Depot Horse Railroad Company had no power under the articles of association to take a right of way over said Eighteenth street nor construct and operate its road thereon, first, because said Eighteenth street was south and east of the Junction of Main and Delaware, and was outside the terminal points mentioned in the articles of association; second, because the said company not having completed its road over said street in one year after the acceptance by the company of the rights of way granted in the ordinance, the right to do so thereafter became forfeited under the 6th section of said ordinance, which provides that "said company shall have their road completed over all the streets and parts of streets where they are granted a franchise by this ordinance, within twelve months from the acceptance by the company of this ordinance, * * * and in case of failure to have the same completed as aforesaid * * * the common council may take away their franchise by a two-thirds vote; provided that the company may contest such declaration of forfeiture in the courts of competent jurisdiction;" third, because neither the said Union Depot Horse Railroad Company nor defendant claiming under it had obtained the consent of the property owners on said street owning a majority in front feet of the property fronting between the points on Eighteenth street where such road is proposed to be constructed. The petition concludes with a prayer for an injunction.

The defendant, in its answer, after denying certain averments in the petition, alleges that the sheriff of Jackson county, in selling the property under the deed of trust before mentioned, did in fact sell the right of way over Eighteenth street to one Dye, and that in making his deed, by mistake he omitted to convey it, and that to correct this mistake, the said sheriff, as trustee, in 1881, made a deed to said Dye conveying to him said right of way as well as all the other property mentioned in said deed of trust; that said Dye in November, 1881, made a deed of correction conveying to defendant all of the property purchased by him at said sale, and describing it as it was described in the said deed of said sheriff to him. It also sets up that in July, 1875, the Union Depot Horse Railroad Company executed and delivered to defendant a lease for fifty years of all the property and effects of said company, including right of way over Eighteenth street. It also alleges that the Union Depot Horse Railroad Company constructed and put in opera-

tion a continuous line of railway from Forest avenue and Twelfth street, 900 feet south, and three-fourths of a mile east of the junction of Main and Delaware, and thence from said junction to the Union Depot, and thence to the Union Stock Yards; that said company had put in operation under said ordinance upwards of three miles of street railroad, and in constructing and operating the same had expended over $100,000; that about one mile of said road is outside the terminal points specified in the articles of association of said company, and that a large part of said sum was expended in constructing and maintaining that part of said road outside said terminal points.

Upon the trial the court rendered a decree perpetually enjoining defendant from constructing its road on Eighteenth street, from which the defendant has appealed to this court.

One of the controlling questions presented by the record in this case is: Conceding that the Union Depot Horse Railroad Company (under whom defendant claims) in accepting and receiving from the city council of Kansas City the grant of a right of way over Eighteenth street for the purpose of constructing and operating its road thereon, passed the limits of its power, as set forth in the articles of association whereby it became incorporate, can plaintiffs be heard to set that up and ground their right of action on that fact? As preliminary to the solution of this question it may be observed that under the articles of association which gave life to the Union Depot Horse Railroad Company as a corporation, it had the unquestioned right to receive from Kansas City a grant of the right of way for the purpose of constructing, operating and maintaining a road over the streets of said city from the junction of Maine and Delaware streets to the Union Depot and thence to the Union Stock Yards. It may also be observed that the common council of the city, in the exercise of a power conferred by the charter of the city, did on the 9th day of September, 1873, pass an ordinance, one section of which is as follows: "(1) That the Union Depot Horse Railroad Company, a corporation duly organized under the laws of the state of Missouri, be and they are hereby authorized to construct, maintain and operate, in accordance with the general ordinances of the city of Kansas, governing horse railroads, except wherein otherwise especially provided, their horse railroad within the city of Kansas, upon and along the following streets and avenues, to-wit: On Eighteenth street, from the eastern limits of the city, westward to Main street; on Main street, from Eighteenth street to the junction of Main and Delaware streets; on Twelfth street, from Forest avenue to Grand avenue; on Grand avenue from Twelth street to Eleventh; on Eleventh street from Grand avenue to Main street, with right to cross the track of the Kansas City & Westport Horse Railroad Company on Walnut street; on Delaware street from Main street to Sixth street; on Sixth street from Delaware street to Broadway street; on Broadway street from Sixth street to Fifth street; on Fifth street from Broadway street to Bluff street; on Bluff street to the bridge over the railroad tracks, across said bridge on the track already thereon, unless the same shall be removed, in which case the said company shall still have the right of way over said bridge and to Union avenue; on Union avenue, from the bridge aforesaid, to Mulberry street; on Mulberry street, from Union avenue to Eleventh street; on Eleventh street, from Mulberry street to Liberty street; on Liberty street; from Eleventh street to Ottawa street; on Ottawa street, from Liberty street to the state line; and that there shall be only one track on Union avenue from 150 feet east of Santa Fe street to Mulberry street, with the necessary connection of tracks, switches and turnouts to operate the same, and the right to cross the tracks of any other company where necessary on any of the streets aforesaid."

It may also be observed that the said company accepted in due form said grant, and it is conceded that in 1874, and prior thereto, said company constructed its railroad on all the streets mentioned in said ordinance except Eighteenth street from the eastern limits of the city west to Main street, and except on Main street from Eighteenth street north to Eleventh street. It may also be observed that so much of the road as was constructed on Twelfth street from Forest avenue to Grand avenue, and on Grand avenue from Twelfth to Eleventh street, and on Eleventh street from Grand avenue to Main street, and thence from Main street to the junction of Delaware and Main streets, lay to the south and east of said junction, and that no one of the above specified streets on which the road was constructed lay between the junction of Main and Delaware streets and the Union Depot. This will be manifest from the following map. It may be further observed that said Union Depot Horse Railroad and defendant have, ever since 1874, maintained and operated its horse railroad on said streets without objection from said city or the state, and that large sums of money were expended in constructing said railroad on said streets. It also appears that the road was not constructed on said Eighteenth street in consequence of a financial panic, and the inability of the said corporation to negotiate its bonds, and that the work of constructing it on said street was not resumed or begun till 1881, when defendant was enjoined in this proceeding from further prosecuting it.

While it may be true, as counsel for plaintiff contend, that under the articles of as-

sociation the corporation exceeded the powers it acquired in virtue of them, by accepting a grant of the right of way over this particular street, viz.: Eighteenth street, for the purpose of constructing its road, we are of the opinion that the question can only be raised by the state in a proceeding instituted for that purpose. We can perceive no distinction in principle between this case and the case of Chambers v. City of St. Louis, 29 Mo. 543, where the question was presented whether the city of St. Louis, being only authorized to purchase such lands as might be necessary for the purposes of the corporation, could take lands outside of her limits not necessary for such purposes. Judge Scott, in delivering the opinion of the court, observed: "Whether these lands are necessary for the corporation, is a question that can only arise in a proceeding instituted by the state against the city for abusing her right to purchase lands. The city had a power to purchase; if that power has been exceeded, then it has been violated, and the city charter may be forfeited in a suitable proceeding; and until that is done she would hold the land. The city may hold lands outside of the city for certain purposes. Shall she be compelled to contest with every occupant who may get possession of them her right to take and hold lands? There being a right in the city to purchase, if there is a capacity in the vendor to convey so soon as a conveyance is made there is a complete sale; and if the corporation in purchasing violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the state and the city. * * * The city is duly incorporated with authority to hold, purchase and convey such real estate as the purposes of the corporation may require, and if in holding and purchasing real estate she passes the exact line of her power, it belongs to the government of the state to exact a forfeiture of her charter, and it is not for the courts in a collateral way to determine the question of misuser by declaring void conveyances made in good faith." The doctrine of this case has been followed and re-affirmed in the following cases: Kinealy v. Railway Co., 69 Mo. 663; Martindale v. Railroad Co., 60 Mo. 510; Bank v. Hunt, 76 Mo. 439; Shewalter v. Pirner, 55 Mo. 218; Land v. Coffman, 50 Mo. 243. In the case of Martindale v. Railroad Co., it was said by Judge Sherwood, speaking for the court, "that the only exception to the rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation is when express legislative permission is granted." If the principle announced in these cases needed vindication, it would be abundantly sustained by numerous adjudications of other courts of the highest respectability.

Applying the principle thus declared to the case before us, and the right of plaintiffs to maintain the present proceeding cannot be upheld. The Union Depot Horse Railroad Company had the undoubted power to receive grants of the right of way, and the common council, by virtue of the city charter, the unquestioned power to bestow upon said company the right of way for the purpose of constructing and operating its road on such streets as might be necessary for its operation from the junction of Main and Delaware streets to the Union Depot and thence to the Union Stock Yards in West Kansas City, as far at least as the state line, and if the corporation in accepting the right of way and receiving authority to construct its road on Eighteenth street, passed the exact limits of its power and accepted a right of way over a particular street not necessary for the construction of its road from the junction of Main and Delaware to the Union Depot and Stock Yards, it is for the state alone to interfere for such abuse of its corporate authority.

It is also contended by counsel that the failure of the Union Depot Railroad Company to complete its road on Eighteenth street within one year after the right of way granted in the ordinance had been accepted by said company, operated as a forfeiture of the right. This argument is based on section 6 of said ordinance, which is as follows: "Section 6. The said company shall have their road completed over all the streets and parts of streets where they are granted a franchise by this ordinance, within twelve months from the acceptance by said company of the provisions hereof, provided that if they shall be hindered by any legal process or by the city, the time they are so hindered shall not be counted, and in case of failure to have the same completed as aforesaid, or, if they shall willfully violate any other provision of this or the general ordinances of the city, the common council may take away their franchises by a two-thirds vote; provided that said company may contest such declaration of forfeiture in the courts of competent jurisdiction."

The condition contained in the above section being a condition subsequent, the right of way, when accepted by the company, vested at once, subject to be defeated, at the election of the city, by a two-thirds vote of the common council, for a breach of the condition. The forfeiture of the right of way which the city (if not estopped by its acts of acquiescence and encouragement) might have declared on a breach of the condition cannot be taken advantage of by private parties, it being a matter of contract between the city and the corporation, for the breach of which the city alone can complain. This doctrine is distinctly stated in the cases of Knight v. Railroad Co., 70 Mo. 231, and Atlantic & P. R. Co. v. City of St. Louis, 66 Mo. 228. In the case last cited, the rule laid down in the case of Brooklyn Cent. R. Co. v. Brooklyn

City R. Co., 32 Barb. 364, was approvingly quoted, it being there said: "If the Central Company claim that the common council have the right to annul or impair the grant to the City Company for the breach of the condition to complete the work in a given time, it encounters this impediment: The condition to complete within a given time, is one of those distinguished in law as conditions subsequent. The effect of a deed with a condition subsequent is to vest the estate in the grantee subject to be defeated by his omission to perform the condition. The omission does not ipso facto determine the estate, but exposes it to be determined at the election of the grantor."

It is further insisted that by virtue of section 8 of the amended charter of Kansas City (Laws 1875, p. 209), the right of defendant to construct its road on Eighteenth street was taken away, because the consent of the property owners owning a majority in front feet of the property fronting on said street had not been obtained. So much of said section as is material in the consideration of the question raised, is as follows: "Nor shall said city council grant the right of way over or along any street in said city to any street or horse railroad company for the construction of a horse railroad without the consent of the property owners owning a majority in front feet of the property fronting on said street between the points on such street where such road is proposed to be constructed, nor shall any street railway hereafter be constructed or laid down without such consent." Conceding for the argument, without deciding the point, that this section was intended to prohibit the construction of any street railroad, after the passage of the law, on any street without the consent of the property owners along said street, the question then arises was it within the power of the legislature so to amend the charter as to take away a right which had already vested to construct a street railroad on a street, when no such consent of the property owners was a condition precedent to the vesting of such right. It is conceded that under the charter of Kansas City, as it existed prior to the passage of the act of 1875, supra, the common council was fully empowered to grant to any person or corporation the right of way over any of its streets for the purpose of constructing and operating a street railroad, without the consent of the owners of property along said streets. It is also conceded that the common council passed the ordinance granting to the Union Depot Railroad Company the right of way over all the streets mentioned therein, and it is shown by the record before us that defendant promptly accepted the grant and constructed over three miles of railroad on all the streets mentioned (at the cost of many thousand dollars,) except on Eighteenth street, from the eastern limits of the city west to Main street, and except on Main street from Eighteenth street north to Eleventh street.

Basing our conclusion upon the above facts, we are of the opinion that when the grant of the right of way on said streets was accepted by the said company, and more than three miles of road actually constructed, the right of way on all of said streets became a vested right which could not be impaired or taken away by legislative enactment. State ex rel v. Miller, 66 Mo. 329; State v. Miller, 50 Mo. 129. In the above case of State ex rel v. Miller, supra, it was held that public corporations are the auxiliaries of the state in municipal government, and neither their existence nor their privileges rest upon anything like a contract between them and the legislature; but when such a corporation, by authority of the state, contracts with a third person whereby rights become vested in such person, they cannot be divested by the state; such a contract is pro hac vice the contract of the state, and if imperfectly made, can be validated by it, and when so validated cannot be violated by the state.

It is also argued that the Union Depot Horse Railroad Company had no power to mortgage its right of way, and that, therefore, Dye, who purchased the right of way at the sale made under the deed of trust or mortgage, could not and did not acquire said right, and that consequently his deed to defendant was inoperative to convey the same to defendant. This position, we think, is answered by section 706, Revised Statutes, which, among other things, provides "that every corporation as such * * * has power to hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation may require, * * * and also to take, hold and convey such other property, real, personal and mixed, as shall be necessary for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability belonging to the corporation." The right of way acquired over Eighteenth street was an incorporeal hereditament, and, therefore, property, and the right to mortgage it was full and complete under the statute. The cases to which we have been cited as to the vendibility of a corporate franchise—that is the right to be, have no application to the vendibility of a property right, the sale or mortgage of which is expressly authorized by statute.

Judgment reversed, and bill dismissed. All the judges concur, except Judge HENRY.

Street railways have not exclusive use of their tracks, but have superior right to use them. Vigilance demanded of motorman. Duty to look each way before crossing tracks.

EHRISMAN v. EAST HARRISBURG CITY PASSENGER RY. CO.

(150 Pa. St. 180, 24 Atl. 596.)

Supreme Court of Pennsylvania. July 13, 1892.

Appeal from court of common pleas, Dauphin county; J. W. SIMONTON, Judge.

Action by George M. Ehrisman against the East Harrisburg City Passenger Railway Company for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

PAXSON, C. J. On the 26th of August, 1891, the plaintiff was driving a one-horse market wagon along Second street, in the city of Harrisburg. In attempting to cross the defendant company's road upon this street, his wagon was struck by a moving car, causing the injury for which this suit was brought. He was driving down the street in the same direction as the car; and when about 50 or 60 feet from the track, according to his testimony, he looked out, but did not see a car coming. He then drove his horse, to use his own expression, "cati-cornered" across the track, and without looking out again before he crossed it. When seen by the motor man in charge of the car, his wagon was moving in the same direction, and the accident was evidently caused by pulling his horse directly across the track in front of the car. The degree of care requisite to be observed in crossing the track of a steam railroad has been the subject of repeated decisions. In Railroad Co. v. Beale, 73 Pa. St. 504, it was held to be the duty of the traveler to stop, look, and listen before crossing the track. The rule was declared to be an unbending one, and a failure to observe it is negligence *per se*. The doctrine of this case was much criticised at the time, but is now generally accepted as the law in this country. Subsequent reflection and experience have only strengthened our view of its wisdom. We have no doubt that, in many instances, it has been the means of saving human life. If strictly observed, accidents at railroad crossings would be as rare as they are now frequent. No rule, however wise, can avert the consequences resulting from negligence. The large increase of street railways in our cities and large towns within the last few years, while it has added greatly to the convenience of the citizens, has also added another element of danger. It is therefore necessary to define as nearly as may be the relative duties of street car companies and citizens at street crossings or other places. There is this distinction to be observed between steam railroads and street railways. In the case of the former, they have the exclusive right to the use of their tracks at all times and for all purposes, except at road crossings. Street railways have not this exclusive right. Their tracks are used in common by their cars and the traveling public. While this common use is conceded, and is unavoidable in towns and cities, the railway companies and the public have not equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: *First*, the fact that the car cannot turn out or leave its track; and, *secondly*, for the convenience and accommodation of the public. These companies have been chartered for the reason in part, at least, that they are a public accommodation. The convenience of an individual, who seeks to cross one of their tracks, must give way to the convenience of the public. It would be unreasonable that a car load of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle. On the other hand, it is the duty of the companies to see that their motor men shall be on the alert, not only at street crossings, but everywhere upon the tracks, to see that citizens are not run down and injured. The rule to stop, look, and listen is applicable in part, at least, to crossing street railways. A person driving a vehicle has but to use his eyes to avoid such accidents. There is no danger, as in the case of steam roads, of stopping a horse at the very edge of the track. When, therefore, a citizen attempts to cross such track it is his duty, when he reaches it, to look in both directions for an approaching car. It very rarely, if ever, happens that the street is so obstructed that the car may not be seen as the citizen approaches the track. It is his duty to look at that point, and, if there is any obstruction, to listen; and his neglect to do so is negligence *per se*. This is an unbending rule, to be observed at all times and under all circumstances. In the case of steam roads, a question sometimes arises as to the proper place to stop, look, and listen. Where there is a fair doubt upon this question, we have held that it must be submitted to a jury. But no such case arises in the case of city railways. If the citizen looks just before he crosses, he avoids all danger of accident.

Applying these principles to the case in hand, it is manifest the plaintiff was guilty of contributory negligence. He never looked in the direction of the approaching car at the time he turned the head of his horse across the track. When he did look, he was 50 or 60 feet away, with a loaded wagon, and his horse walking slowly. Moreover, he did not cross directly, but in an oblique direction, which would add considerable to the time of crossing. During that period an electric car would travel a considerable distance. The conductor may not have anticipated that the plaintiff would attempt to cross the track immediately in front of his car. Be that as it may, and conceding the negligence of the company, the contributory negligence of the plaintiff was so palpable that the court below should have so declared it, as a matter of law, and instructed the jury to find for the defendant.

Judgment reversed.

Cf. Metropolitan Railroad Co. v. Johnson (1892) 90 Ga. 500, 16 S. E. 49, where the rule approved is that the plaintiff was bound to look and listen if prudent men would do so under like circumstances.

Company not held to such responsibility as a steam-railway company, with respect to place where passengers alight.

CONWAY v. LEWISTON & AUBURN HORSE RAILWAY CO.

(87 Me. 283, 32 Atl. 901.)

Supreme Judicial Court of Maine. March 13, 1895.

Exceptions from supreme judicial court, Androscoggin county.

This was an action on the case by Lottie Conway against the Lewiston & Auburn Horse-Railroad Company, upon which the plaintiff recovered a verdict of $347.17 for injuries received by her in alighting from the defendant's horse car on the evening of August 27, 1892, on Skinner street, in Lewiston, her ankle being broken. The plaintiff claimed that at the point where she alighted, close by the car, was a ditch at the side of the road, and that the conductor came along when he stopped the car, and helped her off at this point; that in the dark, not knowing anything about the ditch, and supposing it to be a safe place to alight, she stepped down, and received the injury. Judgment for plaintiff. Defendant excepts. Sustained.

A. R. Savage and H. W. Oakes, for plaintiff. F. W. Dana and W. F. Estey, for defendant.

EMERY, J. The defendant company was operating a street railway through various streets in Lewiston. The plaintiff was being transported along the street, as a passenger, on one of the company's open cars. Upon her signifying a desire to alight, the car was stopped to enable her to do so, though at some distance beyond the place where she gave the signal. It chanced that at the place where the car stopped the side of the street sloped away into a ditch, so that the step down from the car to the surface of the ground was longer than usual, or than she anticipated, and consequently she lost her balance, fell, and was injured. She claimed at the trial that the company was bound to stop the car at a place safe for alighting, and, this place proving to be unsafe, the company was responsible for her injury.

Thereupon, the presiding justice ruled and instructed the jury, in part, as follows: "I instruct you, as matter of law, that it is a duty incumbent upon the common carrier, it is a duty upon this defendant corporation, carrying passengers for hire, to give them a suitable place of ingress, or opportunity to enter upon the car, and to give them a place of safety for exit or egress from the car. It is a question of fact for you, from the evidence in this case, to decide whether or not, at the point where this car stopped, there was a suitable or safe place for this plaintiff to alight from that car.

"If it was not a safe place, under all the circumstances of the case, and an injury was received by her, and she herself was in the exercise of due care at that time and place, then she is entitled to recover."

The correctness of this statement of the law applicable to street railways is the question presented by the defendant's exceptions.

Upon a careful reading of the language of the ruling, it will be seen that the question of care or negligence on the part of the defendant was entirely eliminated. No matter how great and painstaking the care and foresight of the defendant in this very matter of finding a safe place for alighting, the ruling rendered them of no avail. No matter how safe the place may have appeared, no matter that there was nothing to indicate to the most prudent and vigilant man a lack of safety, the ruling held the defendant in fault. The only question left to the jury was whether the place was in fact safe or unsafe. The jury were, in effect, told that if the place was in fact unsafe the plaintiff was entitled to recover, notwithstanding the most extreme care on the part of the defendant company.

Whether the ruling is a correct statement of the law applicable to common carriers of passengers, which have the power of constructing, and exclusively controlling, places for passengers to alight, is not the question here. This defendant company, so far as the case shows, had no such power. It had, so far as appears, no control whatever over the ditches, or the streets outside, or even inside, its rails. It could not select the places in the streets where its track should be laid, or its cars run. It could not construct nor control any places at which passengers were to step on or off its cars. It had to locate its track and run its cars where the public authority directed. It had to leave the center, sides, and surface of the streets and ditches to the same authority. Passengers entering or leaving the cars had to use the streets in the condition they were left by the authority in control of them. Such passengers were not in the care of the company till they got on the car. They were no longer in its care when they stepped off the car. The company's care and duty began when its control began, and ceased when its control ceased.

In the absence of any authority given the street-railway company over the streets, it must be evident that it cannot be held as an insurer of their safety for passengers to alight upon.

It is urged, however, that the ruling does not require a street-railway company to provide a safe place, but only to find a safe place, on the street, before inviting passengers to alight. But, with this interpretation, the ruling still throws out the element of possible great and anxious care on the part of the company. If, after the highest degree of care in the selection, the place stopped at proves unsafe in fact, however safe in appearance, the company is allowed no de-

fense. The surface may appear hard, flat, and smooth, and the best possible place for alighting; and yet a hidden defect, not known to nor ascertainable by the company after careful inspection, may cause an injury to the alighting passenger. The fault, if any, in such case, would be in fact upon the party charged with the duty of keeping the street in repair; but the ruling would place it on a party having no such duty, nor any control over the street. We think the ruling is erroneous, with whatever interpretation it is fairly susceptible of. Railroad v. Wakefield, 103 Mass. 261; Creamer v. Railway Co., 156 Mass. 320, 31 N. E. 391.

In the case of Railway Co. v. Scott, 86 Va. 902, 11 S. E. 404, and in the other cases cited by the plaintiff, in which the street-railway company was held liable, it will be found that the question of the care or negligence of the company was not eliminated; hence they are not authorities in support of this ruling.

Exceptions sustained.

Collision of car with vehicle ahead of it, on the railway. Request to driver to turn off. Contributory negligence.

WOOD v. DETROIT CITY STREET RY. CO.

(52 Mich. 402, 18 N. W. 124.)

Supreme Court of Michigan. Jan. 16, 1884.

Error to Wayne.

John G. Hawley, for plaintiff and appellant. John C. Donnelly, for defendant.

COOLEY, C. J. This is an action for personal injuries alleged to have been caused by the driver of the defendant negligently causing his car to run against the vehicle of the plaintiff as he was driving along one of the streets of Detroit. The plaintiff was sworn as a witness in his own behalf, and he also called the driver as his witness. After hearing both stories, the circuit judge ruled that there was nothing to go to the jury, and directed a verdict for the defendant The plaintiff brings error.

According to the plaintiff's story he was driving an one-horse vehicle along the street on one side of the defendant's track, when he encountered obstructions and turned towards the tracks, so that his right-hand wheels were over the rails. He did not look behind him to see if a car was coming until he felt something strike the rear wheel. He then looked around and saw it was the street car, and the driver, as he says, "motioned me with one hand to go on, or he would knock a wheel off me. I laughed at him and said, 'You better not knock off more than one or two of them, or somebody will have to pay for them.' He kept on motioning to get out of the way. I told him I could not get over those wagons, and I was not going to try, but I would get out of his way just as soon as ever I could. I kept on. There was a number of wagons standing on the other side of the street, loaded with brick, and three, or four, or five of them with the rear ends of the wagon out on the street further than the fore end, which brought the rear end of these wagons very near the car track, so that I had to get with the wheels on the right-hand side of my wagon partially onto the track, and some places it got off the track, and some places I had to get right out pretty well over the track." Up to this point the plaintiff was not only in fault, but he was the only party in fault. He had driven upon the track in front of an approaching car, without looking around until the car had come in collision with his vehicle. This was gross carelessness on his part. But further on his evidence shows that the other side of the track was entirely unobstructed, and that there was nothing to prevent his crossing at once and allowing the street car to proceed on its way. The car had come to a stand-still on the first collision, and the plaintiff's conduct in maintaining his ground, and responding to the driver's request that he should get out of the way by a laugh and a threat, was not only a wrong to the defendant, but also to any persons who might then be riding in the car, or awaiting its coming.

But the plaintiff further testified that as he was leaving the track the driver called out, "God damn you, I can smash you anyhow," and that he let go the brake and the car almost instantly struck the plaintiff's wagon and threw it over, inflicting the injury complained of. The inference from this might be that the driver purposely, and in the anger excited by their altercation, ran his car against the plaintiff's wagon; and, if the action had been brought for the trespass, it might become necessary to decide whether, under cases like Wright v. Wilcox, 19 Wend. 343, the defendant would be responsible. In that case it was decided that where the servant willfully drove his master's conveyance over a third person and injured him, the trespass was that of the servant, for which the master was not liable. The case was followed in Turnpike Co. v. Vanderbilt, 1 Hill, 480, in error, 2 N. Y. 479, where the master of a vessel had purposely run the vessel into another; and in Railroad Co. v. Downey, 18 Ill. 259, where the engineer upon a railroad purposely run his engine over live stock. Also, in De Camp v. Railroad Co., 12 Iowa, 348, and many other cases.

The general principle, that the master is not liable for his servant's trespasses, is familiar, and was recognized by this court in Railroad Co. v. Bayfield, 37 Mich. 205. And if it were important to determine whether the injury was one purposely inflicted, and not one resulting from carelessness, the question would no doubt be one to be submitted to the jury. Rounds v. Railroad Co., 64 N. Y. 129. But this is an action in case, and the ground on which it is sought to charge the defendant is that its servant negligently drove the car against the plaintiff's vehicle. We are then to see whether, if negligence on the part of the driver is made out, or there is any evidence tending to prove it, the plaintiff himself, on his evidence, does not appear to have been at least equally negligent. And we think he does. He knew very well he was in the driver's way, and he had ample time and opportunity to get out of danger if so disposed. That he was not disposed to allow the car to go on until it suited his pleasure to do so, is quite apparent; and there is abundant reason in his evidence for believing that he was purposely annoying the driver and delaying the car. If so he cannot complain of the consequences.

The driver's testimony is quite different from the plaintiff's He testified that when he first signalled the plaintiff to get off the track, the plaintiff made no effort to do so. The driver told him to get off, or he would be run into, and he replied, "Run, and be

damned;" he had as much right to the track as the driver had, and would get off when he pleased. He drove right along on the track, looking back and scolding the driver. Finally he turned off, and the car moved on, but he almost immediately turned again towards the track sufficiently to be struck by the car. If this evidence is true the contributory negligence of the plaintiff was plain and very gross, and he must bear the consequences. Whether, therefore, we believe the plaintiff or the driver, the ruling of the circuit judge was well warranted.

The judgment must be affirmed, with costs.

The other justices concurred.

Boarding electric car in motion. Inference as to plaintiff's use of due care. Question for jury.

CORLIN v. WEST-END STREET RAILWAY CO.

(154 Mass. 197, 27 N. E. 1000.)

Supreme Judicial Court of Massachusetts. Suffolk. June 29, 1891.

Exceptions from superior court, Suffolk county; Charles P. Thompson, Judge.

An action was brought by K. A. Corlin against the West-End Street Railway Company to recover for personal injuries sustained while attempting to board a car. At the conclusion of the testimony for plaintiff, defendant asked the court to rule upon the evidence that the plaintiff was not entitled to recover. The court so ruled, and the jury returned a verdict for the defendant. Plaintiff brings exceptions.

Champlin, Ryther & Wentworth, for plaintiff. *M. F. Dickinson, Jr.*, and *S. Williston*, for defendant.

KNOWLTON, J. It was admitted by the defendant at the argument that there was evidence on which the jury might have found that the defendant was negligent. The only ground on which it was contended that the ruling of the court should be sustained was the alleged absence of evidence that the plaintiff was in the exercise of due care. The defendant conceded that the mere fact that the plaintiff was getting on a street-car propelled by electricity while it was in motion did not show negligence on his part, but argued that the court should take judicial notice that street-cars propelled by electricity often run at a rate of speed which makes it dangerous for passengers to attempt to get upon them, and that the plaintiff failed to show that this car was not so running. It has often been held that the fact that a horse-car is in motion does not necessarily make it negligent as a matter of law for a passenger to attempt to get upon it, although we can imagine cases in which, on account of the rate of speed or for other reasons, it would be negligence in law for a person of ordinary strength and agility to do so. Briggs v. Railway Co., 148 Mass. 72, 19 N. E. Rep. 19; McDonough v. Railroad Co., 137 Mass. 210; Meesel v. Railroad Co., 8 Allen, 234; Murphy v. Railway Co., 118 Mass. 228. There is nothing in the bill of exceptions to show that any different rule should be applied than if the car had been a horse-car, moving at the same rate of speed. It is to be inferred that the car was designed for the transportation of passengers from place to place along the public streets, and to take them up and leave them as requested. No platforms or other conveniences for getting on or off were constructed at particular points on the route, and, if there was a rule requiring the car to be stopped to receive and discharge passengers only at designated places, the bill of exceptions does not show it. On the question whether the plaintiff was using due care, such a rule would be immaterial, unless he knew it or ought to have known it. It is probable that the car could be as easily controlled as a horse-car, and we see no reason for applying to it a rule of law which is not applicable to horse-cars. The plaintiff described in a general way his own conduct, the conduct of the driver, and the motion of the car just before and at the time of the accident. He did not give in express terms his estimate of the rate of speed at which the car was going. If a jury could properly have found from his testimony that he was acting as men of ordinary prudence are accustomed to act in getting on the car under the circumstances, the ruling of the court was erroneous. It has been held that the absence of evidence of the particulars of a plaintiff's conduct is not fatal to his recovery where negligence of the defendant is shown, and where it appears in general that the plaintiff was in the line of his duty in a place where no particular act of precaution was required, and where it does not appear that he was guilty of any act of negligence. In such a case it may be inferred that he was ordinarily careful. Maguire v. Railroad Co., 146 Mass. 379, 15 N. E. Rep. 904. In the present case the plaintiff testified that when the car approached him he signaled to the driver to stop by raising his hand, and that the driver looked straight at him, and made a motion with the motor crank; that it seemed to him that the car slackened its speed, and as it was slackening up he put his right hand on the railing to get on, but the car shot forward as he took hold of the railing, and he fell to the ground. Being asked whether the car had stopped when he put out his hand to get on, he answered, "Not to a dead stop." There was some evidence tending to show that the speed of the car was diminished just before the plaintiff attempted to get on, and was then suddenly increased; and we cannot say as a matter of law that the plaintiff was negligent. We think it was a question for the jury, on all the evidence, whether he was using such care as ordinary persons are accustomed to use under like circumstances. There is much to indicate that the car was going too fast to give the plaintiff an opportunity to get upon it safely, and that he ought not to have tried to get on; but, in the opinion of a majority of the court, the question presented by his account of the circumstances is one of fact rather than of law, and it should have been submitted to the jury. Exceptions sustained.

Elevated road. Cinders dropped on passers in street. Burden of proof of negligence.

SEARLES v. MANHATTAN RY. CO.
(101 N. Y. 661, 5 N. E. 66.)
Court of Appeals of New York. March 2, 1886.

Edward S. Rapallo, for appellant. H. Morrison, for respondent.

EARL, J. There was sufficient evidence to show that the plaintiff's eye was injured by a cinder lodged therein; that the cinder came from a locomotive upon defendant's railway; and that the plaintiff was free from contributory negligence. But there was an utter failure of evidence to show that the accident occurred from any fault, negligence, or unskillfulness on the part of the defendant. The defendant had the right to operate its railway over the street by steam, and to generate steam by the use of coal, and any damage necessarily caused by the careful and skillful exercise of its lawful rights could impose no obligation upon it. To maintain his action, therefore, the plaintiff was bound to give evidence legitimately tending to show that the damage to his eye was caused in consequence of some negligence or unskillfulness chargeable to the defendant.

The undisputed evidence shows that all the appliances used upon defendant's locomotives to prevent the escape of sparks and cinders were skillfully made, and were the best known. There was no evidence that any of such appliances were defective or out of order. On the contrary the proof tended to show that they were in order. The mere proof of the escape of cinders was not sufficient, as the evidence showed that their escape could not be avoided and was inevitable. According to the proof, cinders from one of defendant's locomotives could come only from the smoke-stack or ash-pan. There is no claim that the defendant is liable for this accident if the cinder came from the smoke-stack; but the claim is that it came from the ash-pan because it was out of repair. But there was no evidence that the ash-pan was out of repair, or that the cinder came from it. When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damages were produced by the former cause, and he must fail, also, if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture; and a bare possibility that the damages were caused in consequence of the negligence and unskillfulness of the defendant is not sufficient.

The judgment should therefore be reversed, and a new trial ordered; costs to abide event.

All concur, except DANFORTH, J., dissenting; RAPALLO, J., taking no part; and ANDREWS, J., absent.

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